SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 353

IVAN MRVICA, PETITIONER,

vs.

P. A. ESPERDY, DISTRICT DIRECTOR, IMMIGRATION & NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 27553

October Term, 1962

IVAN MRVICA, Plaintiff-Appellant,

—v.—

P. A. ESPERDY, District Director, Immigration & Naturalization Service, Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO PLAINTIFF-APPELLANT'S BRIEF—
Filed January 30, 1963

[fol. 1]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DOCKET ENTRIES

Date	*Proceedings and Papers Filed*
June 21, 1960	Filed complaint and issued summons
July 1, 1960	Filed summons and return, served defendant Esperdy
Jan. 19, 1962	Filed defendant's affidavit, memorandum and notice of motion for summary judgment Ret. 2-13-62.
Feb. 7, 1962	Filed plaintiff's affidavit and notice of motion for summary judgment Ret. 2-13-62.
Feb. 7, 1962	Filed plaintiff's memorandum in support of motion
Feb. 7, 1962	Filed affidavit of Edith Lowenstein in opposition
Feb. 20, 1962	Memorandum endorsed on plaintiff's motion filed 2-7-62—Motion denied. See opinion on defendant's motion for summary judgment—Metzner, J.
Feb. 21, 1962	Filed opinion #27,585—plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. So ordered—Metzner, J.
Feb. 21, 1962	Filed judgment; adjudged: the defendant has judgment against the plaintiff—Clerk.
Apr. 6, 1962	Filed plaintiff's notice of appeal
Apr. 6, 1962	Filed Bond. ($250.00) undertaking for costs on appeal.

[fol. 2]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

60 Civ. 2449

IVAN MAVICA, Plaintiff,

—v.—

P. A. ESPERDY, District Director, Immigration & Naturalization Service, United States Department of Justice, Defendant.

COMPLAINT—Filed June 21, 1960

The plaintiff, a citizen and national of Yugoslavia, by his attorney for his complaint, respectfully alleges:

1. This is an action for a declaratory judgment under the Declaratory Judgment Act (28 U. S. C. 2201) and for review of an administrative ruling and for an injunction under the Administrative Procedure Act (5 U. S. C. 1001 et seq.).

2. The plaintiff was born in Yugoslavia in December 17, 1906. He entered the United States on January 21, 1940 as a non-immigrant crewman and remained in the United States, overstaying his temporary permit.

3. On September 4, 1942 he was ordered deported, but was granted a waiver of inadmissibility under the Ninth Proviso of Section 3 of the Act of February 5, 1917 for [fol. 3] entry into the United States as a crewman without special permission of the Attorney General.

4. Plaintiff effected his own deportation by departing from the United States on October 6, 1942 on the SS Dubravka and thereafter reentered on the same vessel at the completion of the trip on the basis of permission granted him prior to sailing on December 19, 1942, this being the only interruption of his physical presence in the United States from January 21, 1940 to date.

5. On January 6, 1960 the plaintiff filed an application for status as permanent resident pursuant to Section 249 of the Immigration and Nationality Act, as amended by P. L. 85-616 (8 U. S. C. 1259, as amended). The application was filed on the basis that plaintiff entered the United States prior to June 28, 1940, has resided in the United States continuously since such entry, is a person of good moral character, and is not ineligible to citizenship.

6. On April 15, 1960 the plaintiff was advised that his application "to create record of admission for permanent residence" has been denied for the following reason:

> "You are ineligible for the benefits of Section 249 of the Immigration and Nationality Act, as amended, due to your deportation from the United States on October 6, 1942, which constituted a break in your continuous residence in the United States. (Matter of P— Interim Decision 976.)"

7. On May 17, 1960 plaintiff was advised that the Regional Commissioner for the Northeastern Region has af- [fol. 4] firmed the denial of plaintiff's application under Section 249 of the Immigration and Nationality Act.

8. Section 249, Immigration and Nationality Act, as amended by P. L. 85-616 (8 U. S. C. 1259 as amended) authorizes creation of a record of lawful admission for permanent residence, of aliens who entered the United States prior to June 28, 1940, if they have resided in the United States continuously since entry. The plaintiff fulfills this requirement, his temporary absence having been a break in physical presence, but not in residence.

9. Defendant, in ruling that plaintiff's temporary absence from the United States, during which he executed a pending deportation order, was a break in his residence, even though plaintiff returned with advance permission to return and defendant must have known that due to war conditions, plaintiff's return to the United States was inevitable, is a misinterpretation of the statute or in the alternative, a denial of due process of law under the Constitution of the United States.

Wherefore, plaintiff prays for judgment declaring:

A. That the denial of his application for a record of admission for permanent residence is illegal, in violation of the statute, and unconstitutional.

B. That plaintiff is statutorily eligible to create a record of admission for permanent residence under Section 249 of the Immigration and Nationality Act, as amended by P. L. 85-616 (8 U. S. C. 1259, as amended).

C. That the defendant should be restrained from taking plaintiff into custody and deporting him *pendente lite* and [fol. 5] until final determination of his application under Section 249 of the Immigration and Nationality Act, as amended by P. L. 85-616 (8 U. S. C. 1259, as amended).

D. For such other and further relief as may be deemed appropriate in the premises.

Edith Lowenstein, Attorney for Plaintiff, Office & P. O. Address, 501 Fifth Avenue, New York 17, New York.

Dated: June 20, 1960.

[fol. 6]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT IN SUPPORT OF CROSS-MOTION—
Filed February 7, 1962

State of New York,
County of New York, ss.:

I, IVAN MRVICA, being duly sworn, depose and say:

I have been in the United States since January 1940 and since that time I have never been in any other country except on that one trip in 1942.

When I left on that trip everybody knew that I would come back since there was no place to go during that time

and they needed people for work in the United States and were glad to have me.

When I left on that ship I had no papers to go to any other country and I could not have gone to any other country if I had wanted to. The Immigration Service knew that and I knew that and the captain on the ship knew that.

Ivan Mrvica

(Sworn to January 25, 1962.)

[fol. 7]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION—Filed February 20, 1962

METZNER, *D.J.*:

This action for a declaratory judgment came on to be heard on cross-motions for summary judgment. The action seeks a review of the Attorney General's denial of plaintiff's application to have created a record of lawful admission to this country for permanent residence under section 249 of the Immigration and Nationality Act (8 U. S. C. §1259). Plaintiff claims that the refusal to grant his application was erroneous as a matter of law.

The action taken was predicated solely on the ground that plaintiff did not meet the requirement of continuous residence in the United States after his entry into the country as prescribed by section 249. The pertinent portions of section 249 read as follows:

> "A record of lawful admission for permanent residence may . . . be made in the case of any alien . . . if no such record is otherwise available and such alien shall satisfy the Attorney General that he . . . (b) has had his residence in the United States continuously since such entry;"

Plaintiff originally entered this country as a nonimmigrant crewman on January 21, 1940. He overstayed his

shore leave and was ordered deported on September 4, 1942. The warrant of deportation provided:

> [fol. 8] "If the alien returns to the United States from time to time and upon inspection is found to be a bona fide seaman and entitled to shore leave, except for prior deportation, admission under the 9th Proviso of Section 3 of the Act of February 5, 1917, in reference to this ground of inadmissibility is hereby authorized for such time as the alien may be admitted as a seaman."

On October 6, 1942 the plaintiff voluntarily left this country under the order of deportation, and a note was made in the files of the Immigration and Naturalization Service that the warrant of deportation was executed.

Sometime around the middle of December 1942 the vessel on which the plaintiff had shipped out returned to the United States, and plaintiff left the ship to seek medical care and never returned to the ship. Thereafter, on March 28, 1952, a hearing was held on his deportability, at which time he stated that when he came ashore in December of 1942 he did not intend to ship out again on that vessel. Rather, he intended to obtain a berth on an American vessel, and if he could not get one it was his intention to stay in this country. Subsequently, the plaintiff did not take advantage of different orders granting him voluntary departure and conditional voluntary departure, and finally an order of deportation was entered and the present application, pursuant to section 249, followed.

On this state of the record, this case is indistinguishable from *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292 (N.D. Cal. 1960), *aff'd*, 287 F. 2d 561 (9th Cir. 1961) and *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S.D.N.Y. 1961). These cases clearly hold that an alien subject to a deportation order who departs as a crewman on a foreign voyage [fol. 9] thereby breaks his continuous residence for the purposes of section 249. In the *Lum Chong* case, as in the instant case, the plaintiff returned to this country as a crewman on the same vessel on which he departed, without having disembarked on foreign soil during the voyage.

I agree with the defendant that the granting of Ninth Proviso benefits to the plaintiff in the original order of deportation has no bearing on the disposition of this action. Even if this were to be considered, it only provided that the plaintiff be permitted shore leave in the future if he returned to this country as a bona fide seaman. This did not accord the plaintiff the right to re-enter for permanent residence and cannot be considered as a waiver of the requirement of continuous residence in section 249. Furthermore, by the plaintiff's own admission in his subsequent deportation hearing, he did not return to this country as a bona fide seaman, and therefore was not eligible for the benefits of the Ninth Proviso.

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. So ordered.

Dated: New York, New York, February 20, 1962.

Charles M. Metzner, U.S.D.J.

[fol. 10]

In United States District Court

Southern District of New York

Judgment—February 21, 1962

The Honorable Charles M. Metzner, in an opinion had February 20, 1962 and filed February 21, 1962, having denied plaintiff's motion for summary judgment and granted defendant's motion for summary judgment; it is

Adjudged: The defendant have against the plaintiff.

Herbert A. Carlson, Clerk.

Dated: New York, N. Y., February 21, 1962.

[fol. 11]

NOTICE OF DENIAL, APRIL 15, 1960

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 West Broadway
New York 7, New York

Refer to this File No.
A2 645 117

APR 15 1960

Mr. Ivan Mrvica
414 W. 53rd St.
New York, N. Y.

Dear Sir:

Notice of Denial

Your application to create record of admission for permanent residence has been denied for the following reasons:

You are ineligible for the benefits of Section 249 of the Immigration and Nationality Act, as amended, due to your deportation from the United States on October 6, 1942, which constituted a break in your continuous residence in the United States. (Matter of P..... Interim Decision 976.)

If you desire to appeal this decision you may do so. Your notice of appeal must be filed within fifteen days from the date of this notice. If no appeal is filed within the time allowed, this decision is final.

Appeal in your case may be made to the

☐ Board of Immigration Appeals in Washington, D. C., on Form I-290 A

☒ Regional Commissioner on Form I-290 B

[fol. 12] Copies of the appropriate form have been sent to your attorney. If an appeal is desired, the Notice of Appeal shall be executed and filed with this office, together with

a fee of Ten Dollars. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any question which you may have will be answered by the local immigration office nearest your residence, or at the address shown in the heading to this letter.

Sincerely yours,

P. A. Esperdy, District Director, New York District.

Enclosures, Form I-292 (Rev. 6-1-59)

[fol. 13]

NOTICE OF AFFIRMATION OF DENIAL, MAY 17, 1960

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
20 West Broadway
New York 7, New York

A2 645 117

May 17, 1960

Mr. Ivan Mrvica
414 W. 53rd St.
New York, N. Y.

Dear Sir:

The Regional Commissioner, Burlington, Vermont has affirmed the denial of your application to create record of admission for permanent residence under Section 249 of the Immigration and Nationality Act.

Very truly yours,

R. B. Lindsey, Chief, Applications Section.

Certified

[fol. 14]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 274—October Term, 1962

Argued March 14, 1963

Docket No. 27553

IVAN MRVICA, Plaintiff-Appellant,

v.

P. A. ESPERDY, District Director, Immigration & Naturalization Service, Defendant-Appellee.

Before: Moore, Friendly and Smith, Circuit Judges.

Appeal from order denying plaintiff's motion for summary judgment, granting defendant's motion for summary judgment, and dismissing action for declaratory judgment of eligibility for record of permanent admission under Section 249 of the Immigration and Nationality Act, as amended (8 U. S. C. § 1259), and for injunction against deportation *pendente lite*, in the United States District Court for the Southern District of New York, Charles M. Metzner, District Judge. Affirmed.

Edith Lowenstein, New York, N. Y., for plaintiff-appellant.

[fol. 15]

Roy Babitt, Special Asst. U. S. Attorney, New York, N. Y. (Robert M. Morgenthau, U. S. Attorney for the So. Dist. of New York, on the brief), for defendant-appellee.

OPINION—May 14, 1963

SMITH, Circuit Judge:

Plaintiff, a native of what is now Yugoslavia, entered the United States as a non-immigrant crewman January 21,

1940 and resided continuously in the United States thereafter, except for the period from September 4, 1942 to October 6, 1942 when he was on a South American voyage in a Yugoslav vessel as a seaman, under order of deportation, with a permit for temporary re-entry as a seaman under the Ninth Proviso of Section 3 of the Act of February 5, 1917.[1] He was again ordered deported in 1952 and presently remains here under an administrative stay pending decision in another action, *Dombrovskis* v. *Esperdy*, 195 F. Supp. 488, S. D. N. Y. 1961, appeal pending. He brought this action in the United States District Court for the Southern District of New York on June 21, 1960, under the Declaratory Judgment Act, 28 U. S. C. § 2201, and the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq.*, seeking to establish his eligibility for status as a permanent resident under Section 249 of the Immigration and Nation- [fol. 16] ality Act (8 U. S. C. § 1259)[2] as one who had entered the United States prior to June 28, 1940, had resided

---

[1] The text of the Ninth Proviso follows:

"• • • *Provided further* [9] That the Commissioner of Immigration and Naturalization with the approval of the Attorney General shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission • • •."

[2] Sec. 249 (8 U. S. C. 1259) as amended:

"A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship."

here continuously since such entry, and was otherwise qualified. Plaintiff's motion for summary judgment was denied, defendant's granted, and the action dismissed by the District Court, Charles M. Metzner, District Judge, and plaintiff appeals. We find no error in the court's determination that the 1942 absence interrupted his continuous residence, within the meaning of the statutes, and we affirm.

The issue is by no means as free from doubt as appellee would have us believe, since the language of § 249 speaks in terms of continuous "residence" defined as "place of general abode"; "principal, actual dwelling place in fact, without regard to intent", and it is strenuously and plausibly argued that a merchant ship at sea in a time of worldwide naval war is hardly to be considered in retrospect as having been a "place of general abode". But in determining the meaning of the section we may not ignore the statutory framework in which it exists. Section 101(g) (8 U. S. C. § 1101(g)) provided then as now that any alien ordered deported, who has left the United States, should be considered to have been deported pursuant to law. It is difficult to credit an intent to the Congress to hold a [fol. 17] voyage not an interruption of continuous residence when it operated as a statutory deportation. We agree with the interpretation of the Attorney General in *Matter of P*, VIII I. & N. Dec. 167, 169 (Comm. 1958) that departure while under expulsion proceedings breaks the continuity of residence required by Section 249. Cf. *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292 (N. D. Calif. 1960), aff'd 287 F. 2d 561 (9 Cir. 1961); *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S. D. N. Y. 1961).

At the time of Mrvica's voyage in 1942, relief similar to that now provided by Section 249 (then provided to those who had been in the United States since 1924) was not granted to those subject to deportation. This limitation was, however, removed in 1958. No such exception, however, was made for those like Mrvica, whose deportation had actually occurred during the required period of continuous residence. The removal of the limitation does not affect Mrvica's continuity of residence.

We do not feel that forgiveness of illegal acts of entry before a cut off date necessitates a finding of an intent that

illegal re-entry after the cut off date be also swept within the amnesty by interpreting the continuous residence requirement so that the deportation and illegal re-entry might be ignored. In short, we think Congress did not intend that two illegal periods of residence should be aggregated to make one continuous period. If the Congress should again move up the cut off date it would, of course, solve the problem of those in Mrvica's position, but that is not our province here. Judgment dismissing the complaint is affirmed.

[fol. 18]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Circuit Judges.

IVAN MRVICA, Plaintiff-Appellant,

v.

P. A. ESPERDY, District Director, Immigration and Naturalization Service, United States Department of Justice, Defendant-Appellee.

JUDGMENT—May 14, 1963

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 19] [File endorsement omitted]

[fol. 20] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 21]

SUPREME COURT OF THE UNITED STATES

No. 353—October Term, 1963

IVAN MRVICA, Petitioner,

vs.

P. A. ESPERDY, District Director, Immigration and Naturalization Service.

ORDER ALLOWING CERTIORARI—October 28, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 8 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 353

IVAN MRVICA,

Petitioner,

—against—

P. A. ESPERDY, District Director, Immigration & Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDITH LOWENSTEIN
Counsel for Petitioner Ivan Mrvica
36 West 44th Street
New York 36, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1963

No. .....

IVAN MRVICA,

Petitioner,

—against—

P. A. ESPERDY, District Director, Immigration & Naturalization Service,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Ivan Mrvica, hereinafter referred to as the "petitioner", prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit filed in the above-entitled case on May 14, 1963.

Opinions Below

The opinion of the District Court is printed at pages 7a-9a of the Appendix below and is reported in 202 F. Supp. 214. The opinion of the Court of Appeals is printed in Appendix B hereto, *infra*, pages 15-18, and is reported in 317 F. 2d 220.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on May 14, 1963, Appendix C, *infra*, page 19.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether a brief physical absence from the United States constitutes a break in the continuous residence required for relief under §249, Immigration and Nationality Act, solely because at the time of departure an order of deportation was pending against the alien.

Statutes Involved

The statutory provision involved is §249 of the Immigration and Nationality Act (8 U. S. C. §1259) as interpreted within the framework of §§101(a)(33) and 101(g) of the Immigration and Nationality Act (8 U. S. C. 1101(a)(33) and 1101(g)). All sections are printed in Appendix A, *infra*, pp. 13-14.[1]

Statement of Case and Disposition Below

The facts in the case are not at issue. The petitioner applied for permanent residence under 8 U. S. C. §1259. His application was denied by the respondent on the ground that although he entered the United States prior to June 28, 1940 as required by §1259(a) an interruption of his physical presence in the United States in 1942 constituted a break in his "continuous residence within the United States" as required by §1259(b)(11a).[2] The United States District Court

[1] References hereafter will be to Title 8 of the United States Code, unless otherwise indicated.

[2] Page references are to the Appendix below, unless otherwise indicated.

for the Southern District of New York agreed with this finding (7a-9a) and was affirmed by the Court of Appeals for the Second Circuit (Appendix B, *infra*, pp. 15 *et seq.*).

Petitioner, a citizen of Yugoslavia, 57 years of age, was born December 17, 1906 in Zirje, Dalmatia, at the time when that area was part of Austria-Hungary. Following World War I his birthplace became part of Italy, and after World War II it became part of Yugoslavia. He left his birthplace in 1939 and has not been there since it came under the jurisdiction of the Yugoslav government. He entered the United States on January 21, 1940 on a crewman's permit and has for all practical purposes resided in the United States since that time.

In September 1942 when World War II was at its height, petitioner underwent deportation proceedings and was ordered deported as an overstayed crewman. At that time the United States was in need of able-bodied men and the sea route to Europe was barred to ordinary traffic. Accordingly, petitioner was granted a waiver under the Ninth Proviso of §3 of the Act of February 5, 1917 for reentry into the United States as a crewman, without special permission of the Attorney General.[3]

He took one round trip to South America on the SS DUBROVSKA, the trip lasting from October 6 to December 19, 1942. By remaining on board ship, the petitioner voluntarily executed the order of deportation. He reentered the United States without difficulty by reason of the permission granted him prior to sailing.

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[3] The text of the Ninth Proviso follows:

". . . *Provided further* (9) That the Commissioner of Immigration and Naturalization with the approval of the Attorney General shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission . . ."

There is no evidence in the record that petitioner's "residence in fact" in the United States was interrupted by his short absence. He had registered for the draft in 1940 and had maintained all his ties in the United States, including his bank account and his Union membership. All parties involved, including the Immigration and Naturalization Service, were aware of the fact that the petitioner would return to the United States with the ship, since he had no travel documents which would have facilitated his landing in any other country. During the period in question deportation was impossible.

Except for the absence in 1942 petitioner has not been outside the United States since he first entered in 1940. He was again placed under deportation in 1952.

Petitioner is the beneficiary of an administrative stay of deportation in connection with *Dombrovskis, et al.* v. *Esperdy*, 185 F. Supp. 478 (S. D. N. Y. 1960), 195 F. Supp. 488 (S. D. N. Y. 1961), 209 F. Supp. 673 (S. D. N. Y. 1962), appeal pending. The issues in that case, however, have no bearing on the question raised here.

Reasons for Granting the Writ

1. The decision of the Court below now before this Court for review, deals with an important question of federal law which has not been, but should be settled by this Court.

The Court below held that 8 U. S. C. §1259 (§249 of the Immigration and Nationality Act), which permits adjustment of status to persons who entered the United States illegally prior to June 28, 1940, if the applicant for such relief "has had his *residence* in the United States continuously since such entry", is not available to an alien whose physical presence in the United States was inter-

rupted by a brief journey while he was under order of deportation.

The issue brought before this Court is whether the "continuous residence" required by §1259(b) as a matter of statutory interpretation is identical with "physical presence" where a deportation order is in existence.

The opinion of the Court below, although brief and unanimous, stated:

> "The issue is by no means as free from doubt as appellee would have us believe, since the language of §249 speaks in terms of continuous 'residence' defined as 'place of general abode'; 'principal actual dwelling place in fact, without regard to intent', and it is strenuously and plausibly argued that a merchant ship at sea in a time of worldwide naval war is hardly to be considered in retrospect as having been a 'place of general abode'" (App. B, *infra*, p. 17).

§1259 has not in general been interpreted to require uninterrupted physical presence in the United States rather than continuous residence. In that respect the wording of the provision differs from "suspension of deportation" (8 U. S. C. §1254), another adjustment of status provision for deportable aliens which requires a period of "physical presence" for statutory eligibility.[4] The distinction between "continuous residence" and "continuous physical presence" is new in the Immigration and Nationality Act and has as yet not been fully defined by the courts.[5]

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[4] 8 U. S. C. 1254 as amended October 24, 1962 (P. L. 87-885, §4) since October 1962 is not available to persons such as the petitioner who entered the United States as a crewman.

[5] See *Immigration Law & Procedure*, by Gordon & Rosenfield, Banks & Co. (1959, 1962), p. 773.

The term "physical presence" is comparatively unambiguous and is not defined by statute. "Residence" on the other hand is defined by the Immigration and Nationality Act as

> "'. . . the place of general abode; the place of general abode of a person means his principal, actual dwelling place *in fact*, without regard to intent."[6]

What is "residence", as a term of art, has been the subject of countless court interpretations, the majority of which apparently consider establishment of residence dependent on subjective intent.[7] The Immigration and Nationality Act explicitly removes the element of "intent" from the definition of "residence" for immigration purposes. The congressional intent possibly was to place into statutory language the ruling of the United States Supreme Court in *Savorgnan v. United States*, 338 U. S. 491 (1949).

In that case the question of the petitioner's citizenship depended on whether she had resided in Italy from 1941 to 1945. She claimed that she had been residing there only temporarily and not with the *intention* of establishing "permanent residence" but in the United States in which she claimed she intended to retain her permanent residence. The United States Supreme Court in discussing this contention stated at pp. 504-505:

> "The petitioner's residence abroad met the requirements of the Act of 1940. Sec. 403(a) and 104 used the terms 'residence' and 'place of general abode' without mention of the intent of the person concerned. The Act cleared up the uncertainties which had been left by early decisions as to the type and amount, if any, of

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[6] §101(a)(33), INA (8 U. S. C. 1101(a)(33)), see pp. 13-14.

[7] For a general discussion of the term "residence" see Reese and Green, "That Elusive Word 'Residence,'" 6 Vand. L. Rev. 561 (1953).

> residence abroad that was required to establish expatriation. In contrast to such terms as: 'temporary residence,' 'domicile,' 'removal, with his family and effects,' 'absolute removal' or 'permanent residence,' the new Act used the term 'residence' as plainly as possible to denote an objective fact. To identify the required 'place of residence,' it required only that it be the 'place of general abode.' . . . "[8]

The court concluded from the legislative history that it was irrelevant whether Mrs. Savorgnan *intended* to establish residence in Italy or *intended* to maintain permanent residence in the United States. Her "place of general abode" for four years had been Italy and that objective fact was considered decisive of her residence.

It is submitted that by this very reasoning, which has been codified in the Immigration and Nationality Act, petitioner's "place of general abode" was the United States ever since January 1940 and neither his intention, nor that of the respondent could change that *objective* fact. During petitioner's brief absence all parties involved knew that as a matter of objective fact he retained his residence in the United States and by necessity would return to his previous "place of general abode."

Although the issue has never reached this Court, a number of lower courts have held that for purposes of §1259 absence under an executed deportation order constitutes a break in the continuous residence contemplated by §1259 as amended. *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292 (N. D. Cal. 1960), aff'd, 287 F. 2d 561 (9th Cir. 1961), and *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S. D. N. Y. 1961).

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[8] Footnotes omitted. One footnote points out that where "permanent residence" was intended, the statute used that term. (It might be suggested that where "lawful" residence or "physical presence" was intended the statute also uses the appropriate terms.)

The foregoing cases can be distinguished because in none of them the applicant had prior to departure received permission to reapply under the Ninth Proviso of the Immigration Act of 1917. The District Court had dismissed the complaint chiefly because of the above-cited precedent and because he found the grant of Ninth Proviso relief to the petitioner irrelevant. It is respectfully submitted that the reasoning of the courts below does not stand up in the light of the humanitarian purpose of §1259 and its legislative history.

The institution of "registry" originated with the Act of March 2, 1929 (45 Stat. 1512). Then it applied to aliens who had arrived before the temporary quota law of June 3, 1921. It permitted creation of a record of lawful entry for permanent residence on behalf of those who could meet certain prescribed conditions. Its purpose was to legalize the residence of aliens who had entered improperly before that date, but whose deportation was precluded by the statute of limitations then in effect.[9] The registry statute was codified in the Nationality Act of 1940.[10] The only significant change was to advance the controlling date to July 1, 1924, the effective date of the basic quota law. The 1952 Act retained the registry provision of the 1940 Act. A person subject to deportation was not entitled to registration under that provision.[11] A revision of significance for the appellant, who prior to that date clearly was

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[9] For discussion of legislative history see Gordon and Rosenfield, *Immigration Law and Procedure*, Banks & Co. (1959) and Supplements, p. 735. See also *Senate Rept. No. 1905*, 85th Cong., 2nd Sess. (1958) to accompany H. R. 11874, which later became law. See Codification of the Nationality Laws, House Committee Print, 76th Cong., 1st Sess. (1939), p. 41.

[10] §328(b), Nationality Act of 1940 (54 Stat. 1152).

[11] *United States ex rel. Georgas* v. *Day*, 43 F. 2d 917 (2d Cir. 1930).

not covered by the statute, occurred in 1958.[11] The cut-off date for eligible aliens was advanced to June 28, 1940 (the effective date of the Alien Registration Act of 1940, 54 Stat. 670). The more significant change, however, was that the amendment eliminated the disqualification heretofore existent, of persons who are deportable. This statutory change made the benefits of the statute available to persons of good moral character, even though they were deportable, provided that they are not inadmissible as criminals, subversives or other undesirables.

A situation, such as that now before the court was not mentioned in the legislative history of the provision, but a comparative reading of §249 as enacted in 1952 and its 1958 amendment may well indicate that the interpretation urged upon this Court would not be "judicial revolt against the legislative," as suggested by the lower court in *Lum Chong* v. *Esperdy, supra,* at p. 937.

Immigration & Nationality Act of 1952	*Immigration & Nationality Act as Amended by Act of August 8, 1958*
Sec. 249(a). A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, if no such record is otherwise available and such alien shall satisfy the Attorney General that he—	(a) A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, *as of the date of approval of his application, or, if entry occurred prior to July 1, 1924, as of the date of such entry,* if no such record is otherwise available and such alien shall satisfy the Attorney General that he *is not* in-

[11] Act of August 8, 1958 (72 Stat. 546).

	missible under section 212(a), insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—[18]
(1) entered the United States prior to July 1, 1924;	(1) entered the United States prior to *June 28, 1940;*
(2) has had his residence in the United States continuously since such entry;	(2) has had his residence in the United States continuously since such entry;
(3) is a person of good moral character;	(3) is a person of good moral character;
(4) *is not subject to deportation;* and	
(5) is not ineligible to citizenship.	(4) is not ineligible to citizenship.

The above change created a statute of limitations for illegal entrants who had resided in the United States for many years and have proved themselves to be good members of their community. The legislature has indicated beyond doubt that illegality of status and deportability are not any longer considered a disqualification.

Subsequent legislation should be considered in connection with the interpretation of prior legislation upon the same subject, *Great Northern Railroad Co.* v. *United States*, 62 S. Ct. 529, 315 U. S. 262, 86 L. Ed. 836. The reverse also is true and the change in the legislation which deleted the

[18] Italicized portion in 1952 Act was deleted by amendment. Italicized portions in 1958 Act were added by amendment.

clause (4) above must be considered in the interpretation of the new statute.

Only recently on June 17, 1963 in *Rosenberg* v. *Fleuti*, Supreme Court Docket No. 248, October Term, 1962, —— U. S. ——, 10 L. Ed. 2d 1000, this Court found that a short visit to Mexico is not necessarily a "departure to a foreign port or place . . . " and return from such visit is not necessarily an "entry" within the meaning of §101(a)(13) of the Immigration and Nationality Act (8 U. S. C. 1101(a)(13)).

It is submitted that the petitioner's temporary absence, which was not even a departure to a foreign port or place, but merely a round trip on a merchant vessel during war times, does not interrupt residence for purposes of §1259.[14] The Court's conclusion to the contrary was based on a speculation totally unsupported by the legislative history that "it is difficult to credit an intent to the Congress to hold a voyage not an interruption of continuous residence when it operated as a statutory deportation" (Appendix B, p. 18). If the identical alien had been placed under deportation on the same date, but would have refused to ship out during that period, he would clearly be eligible for the relief. It is submitted that in the absence of congressional history to the contrary, it is unnecessary to impute an intention to Congress which it never expressed and which runs contra to the purpose of the provision and to the humanitarian purpose of the statute.

2. The decision of the Court below should be reviewed because the question of statutory construction discussed in

[14] The significance attributed in the opinion below (p. 17, *infra*), to §101(g), INA (8 U. S. C. 1101(g)) does not appear to prevent the applicability of §249, INA (8 U. S. C. 1259) to the instant case. It does not relate in any manner to the remedy applied for, particularly since petitioner's reentry cannot be termed illegal in view of his permission to reapply.

point "1" *supra* affects the lives of a number of persons who have resided in the United States for many years and whose deportation would be a great hardship. The fact that the Court below was aware of this is well indicated by the concluding paragraph in the opinion below:

> "We do not feel that forgiveness of illegal acts of entry before a cut off date necessitates a finding of an intent that illegal re-entry after the cut off date be also swept within the amnesty by interpreting the continuous residence requirement so that the deportation and illegal re-entry might be ignored. In short, we think Congress did not intend that two illegal periods of residence should be aggregated to make one continuous period. If the Congress should again move up the cut off date it would, of course, solve the problem of those in Mrvica's position, but that is not our province here . . ." (Appendix B, p. 18, *infra*).

It is submitted that congressional action is not necessary for cases such as that of the petitioner, if the statute is interpreted in the humanitarian spirit in which Congress had enacted it.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDITH LOWENSTEIN
Counsel for Petitioner Ivan Mrvica
36 West 44th Street
New York 36, N. Y.

Dated: August 1963

APPENDIX A

Statutes Involved

§249 of the Immigration and Nationality Act (8 U. S. C. 1259), §101(a)(33) and §101(g) of the Immigration and Nationality Act (8 U. S. C. 1101(a)(33) and 1101(g)).

Sec. 249 (8 U. S. C. 1259) as amended:

A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

Sec. 101(a)(33) (8 U. S. C. 1101(a)(33)):

Sec. 101(a) As used in this Act—

* * * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered con-

tinuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.

Sec. 101(g) (8 U. S. C. 1101(g)):

For the purposes of this Act any alien ordered deported (whether before or after the enactment of this Act) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

APPENDIX B

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 274—October Term, 1962

(Argued March 14, 1963 Decided May 14, 1963)

Docket No. 27553

IVAN MRVICA,

Plaintiff-Appellant,

—v.—

P. A. ESPERDY, District Director, Immigration & Naturalization Service,

Defendant-Appellee.

Before:

MOORE, FRIENDLY and SMITH,

Circuit Judges.

Appeal from order denying plaintiff's motion for summary judgment, granting defendant's motion for summary judgment, and dismissing action for declaratory judgment of eligibility for record of permanent admission under Section 249 of the Immigration and Nationality Act, as amended (8 U. S. C. § 1259), and for injunction against deportation *pendente lite*, in the United States District Court for the Southern District of New York, Charles M. Metzner, District Judge. Affirmed.

EDITH LOWENSTEIN, New York, N. Y., *for plaintiff-appellant.*

ROY BABITT, Special Asst. U. S. Attorney, New York, N. Y. (Robert M. Morgenthau, U. S. Attorney for the So. Dist. of New York, on the brief), *for defendant-appellee.*

SMITH, *Circuit Judge:*

Plaintiff, a native of what is now Yugoslavia, entered the United States as a non-immigrant crewman January 21, 1940 and resided continuously in the United States thereafter, except for the period from September 4, 1942 to October 6, 1942 when he was on a South American voyage in a Yugoslav vessel as a seaman, under order of deportation, with a permit for temporary re-entry as a seaman under the Ninth Proviso of Section 3 of the Act of February 5, 1917.[1] He was again ordered deported in 1952 and presently remains here under an administrative stay pending decision in another action, *Dombrovskis* v. *Esperdy*, 195 F. Supp. 488, S. D. N. Y. 1961, appeal pending. He brought this action in the United States District Court for the Southern District of New York on June 21, 1960, under the Declaratory Judgment Act, 28 U. S. C. § 2201, and the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq.*, seeking to establish his eligibility for status as a permanent re[illegible]ent under Section 249 of the Immigration and Nation-

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[1] The text of the Ninth Proviso follows:

"* * * *Provided further* [9] That the Commissioner of Immigration and Naturalization with the approval of the Attorney General shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission * * *."

ality Act (8 U. S. C. § 1259)[2] as one who had entered the United States prior to June 28, 1940, had resided here continuously since such entry, and was otherwise qualified. Plaintiff's motion for summary judgment was denied, defendant's granted, and the action dismissed by the District Court, Charles M. Metzner, District Judge, and plaintiff appeals. We find no error in the court's determination that the 1942 absence interrupted his continuous residence, within the meaning of the statutes, and we affirm.

The issue is by no means as free from doubt as appellee would have us believe, since the language of § 249 speaks in terms of continuous "residence" defined as "place of general abode"; "principal, actual dwelling place in fact, without regard to intent", and it is strenuously and plausibly argued that a merchant ship at sea in a time of worldwide naval war is hardly to be considered in retrospect as having been a "place of general abode". But in determining the meaning of the section we may not ignore the statutory framework in which it exists. Section 101(g) (8 U. S. C. § 1101(g)) provided then as now that any alien ordered deported, who has left the United States, should be con-

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[2] Sec. 249 (8 U. S. C. 1259) as amended:

"A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship."

sidered to have been deported pursuant to law. It is difficult to credit an intent to the Congress to hold a voyage not an interruption of continuous residence when it operated as a statutory deportation. We agree with the interpretation of the Attorney General in *Matter of P*, VIII I. & N. Dec. 167, 169 (Comm. 1958) that departure while under expulsion proceedings breaks the continuity of residence required by Section 249. Cf. *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292 (N. D. Calif. 1960), aff'd 287 F. 2d 561 (9 Cir. 1961); *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S. D. N. Y. 1961).

At the time of Mrvica's voyage in 1942, relief similar to that now provided by Section 249 (then provided to those who had been in the United States since 1924) was not granted to those subject to deportation. This limitation was, however, removed in 1958. No such exception, however, was made for those like Mrvica, whose deportation had actually occurred during the required period of continuous residence. The removal of the limitation does not affect Mrvica's continuity of residence.

We do not feel that forgiveness of illegal acts of entry before a cut off date necessitates a finding of an intent that illegal re-entry after the cut off date be also swept within the amnesty by interpreting the continuous residence requirement so that the deportation and illegal re-entry might be ignored. In short, we think Congress did not intend that two illegal periods of residence should be aggregated to make one continuous period. If the Congress should again move up the cut off date it would, of course, solve the problem of those in Mrvica's position, but that is not our province here. Judgment dismissing the complaint is affirmed.

APPENDIX C

Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of May one thousand nine hundred and sixty-three.

Present:

HON. LEONARD P. MOORE, HON. HENRY J. FRIENDLY, and HON. J. JOSEPH SMITH, *Circuit Judges.*

IVAN MRVICA,

Plaintiff-Appellant,

—v.—

P. A. ESPERDY, District Director, Immigration & Naturalization Service, United States Department of Justice,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Proof of Service

I, EDITH LOWENSTEIN, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of August, 1963, I served copies of the foregoing petition for writ of certiorari on the Solicitor General, Department of Justice, Washington 25, D. C., the Attorney for the Respondent, P. A. Esperdy, District Director, Immigration & Naturalization Service, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to Respondent's attorney of record as follows: Robert M. Morgenthau, Esq., United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York, New York, and the Solicitor General, Department of Justice, Washington 25, D. C.

EDITH LOWENSTEIN
Counsel for Ivan Mrvica
36 West 44th Street
New York 36, New York

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 333

IVAN MEVICA, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B, 15–18) is reported at 317 F. 2d 220.

JURISDICTION

The judgment of the Court of Appeals was entered May 14, 1963. The petition for a writ of certiorari was filed August 8, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an alien crewman "has had his residence in the United States continuously" since his entry so as

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to qualify him for discretionary relief under § 249 of the Immigration and Nationality Act if, after his entry, he was deported and spent the following two-and-a-half months aboard the ship used to effect his deportation.

STATUTE INVOLVED

Section 249 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1259, provides:

> SEC. 249. A record of lawful admission for permanent residence may, in the discretion of of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—
>
> (a) entered the United States prior to June 28, 1940;
>
> (b) has had his residence in the United States continuously since such entry;
>
> (c) is a person of good moral character; and
>
> (d) is not ineligible to citizenship.

STATEMENT

The facts are simple and undisputed. Petitioner entered the United States as a nonimmigrant crewman January 21, 1940, and thereafter overstayed his

temporary permit (App. 2a).[1] His deportation was ordered September 4, 1942, the deportation order directing that he be granted a waiver of inadmissibility under the Ninth Proviso to Section 3 of the Immigration Act of 1917 if he thereafter sought entry into the United States as a crewman (App. 2a–3a). Petitioner "effected his own deportation" by leaving the United States on October 6, 1942, as a crewman on a Yugoslav vessel. He was granted temporary entry as a crewman, under the waiver recorded in the deportation order, when the vessel returned to the United States on December 19, 1942 (App. 3a). He again overstayed his temporary permit and has remained in the United States unlawfully since then. Another deportation order was entered against petitioner in 1952, but he has been permitted to remain here on an administrative stay (Pet. 16).

On January 6, 1960, petitioner filed an application for permanent residence status, seeking registry under Section 249 of the Immigration and Nationality Act (App. 3a). The application was based upon the assertion that petitioner had resided in the United States continuously since his temporary entry as a seaman on January 21, 1940. The district director denied the application, finding that the continuity of petitioner's residence had been broken by his deportation from the United States in 1942, and this decision was affirmed by the regional commissioner on administrative appeal (App. 3a–4a).

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[1] App. references are to the Appendix to petitioner's brief in the court below. Pet. references are to the petition for certiorari.

Petitioner then brought proceedings for judicial review, contending that the administrative officers had misinterpreted the statute (App. 1a–5a). The district court granted summary judgment against petitioner, dismissing the complaint, and this judgment was affirmed on appeal (App. 7a–10a; Pet. 15–18).

ARGUMENT

Petitioner is concededly deportable as an alien crewman who overstayed his shore leave in December 1942. The only issue in the present case is whether he may qualify for the discretionary relief authorized by § 249 of the Immigration and Nationality Act, which permits the Attorney General to grant permanent residence status to certain longtime residents of the United States. Petitioner's application for such status was rejected on the ground that he did not meet the statutory prerequisites. That decision was clearly correct and is consistent with the decided cases to date.

1. To qualify under § 249, an alien must establish both (1) that he entered the United States before June 28, 1940, and (2) that he has had his residence in the United States *continuously* since such entry. The first of these requirements prevents petitioner from relying on his 1942 entry as a basis for relief under § 249.[3] The second requires him to trace *continuous* residence in the United States back to the first half of 1940.

[3] In answer to petitioner's contention that the decision in this case works a hardship upon him, it should be observed that in 1962 Congress considered and rejected an amendment whereby the cutoff date under § 249 would be changed to December 24, 1952. S. Rep. No. 2276, 87th Cong., 2d Sess., p. 3. When a substitute provision was enacted, alien crewmen were excluded from its scope. Cf. H. Rep. No. 2552, 87th Cong., 2d Sess., p. 4.

2. Petitioner concedes that an order of deportation was entered against him after his 1940 entry, and that he voluntarily executed that order by leaving the United States as a crewman on a Yugoslav vessel in 1942 (Pet. 3; App. 3a).[1] During the following two-and-a-half months petitioner was physically absent from the United States. Petitioner nonetheless contends that he remained a resident "in fact" of the United States because he was on board a merchant vessel. This argument cannot be squared with the plain meaning of "deportation" and is inconsistent with the statutory definition of "residence" as that word is used in § 249.

In essence, petitioner is contending that a deported alien can continue to be a resident of the United States. But if the act of deportation has any significance whatever, it must at least terminate the deported person's residency. Whether or not a deported alien takes up residence in another country, his compelled departure surely renders him a nonresident of the United States. The fact that he may subjectively harbor an intent to return to the United States illegally—or, as in this case, to re-enter legally and stay illegally—does not preserve the continuity of his residence.

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[1] The fact that petitioner left voluntarily rather than under compulsion is of no legal significance. Section 101(g) of the Immigration and Nationality Act, 8 U.S.C. 1101(g), provides:

"For the purposes of this Act any alien ordered deported (whether before or after the enactment of this Act) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed."

Moreover, "residence" is defined in § 101(a)(33) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(33), as follows:

> The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. * * *

Petitioner's "actual dwelling place in fact" for the two-and-a-half months after he had been ejected from the United States was the Yugoslav vessel. The court of appeals was reluctant to conclude that petitioner's "place of general abode" was a merchant ship sailing the high seas during a worldwide naval war. But it was petitioner's own choice to depart voluntarily aboard the Yugoslav vessel, rather than resist deportation, which determined his "dwelling place." In any event, his "actual dwelling place in fact" after his departure was assuredly not the United States.

3. Petitioner's argument that an alien can continue to have his residence in this country despite his expulsion pursuant to law has been rejected by the only judicial holdings which have considered the issue. *Sit Jay Sing* v. *Nice*, 182 F. Supp. 282 (N.D. Cal.), affirmed per curiam, 287 F. 2d 561 (C.A. 9); *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S.D.N.Y.). See also *Cheung* v. *Hamilton*, 298 F. 2d 459 (C.A. 1). This contention also conflicts with the announced administrative application of the statute. *Matter of P* ———, 8 I. & N. Dec. 167 (1958).

The cases cited by petitioner are consistent with the result of this case. *Savorgnan* v. *United States*, 338

U.S. 491, held that a person who had lived in Italy for four years had established residence in that country for the purposes of the expatriation statute. *Rosenberg* v. *Fleuti*, 374 U.S. 449, ruled that an alien who resided lawfully in the United States did not make an entry, for the purposes of the immigration laws, when he returned to the United States after a visit of a few hours to an adjacent country. *Fleuti* manifestly did not purport to deal with the status of an alien who was expelled from this country after being here illegally.

4. Petitioner's residence status was not altered by the stipulation in the order of deportation granting him the privilege, under the so-called Ninth Proviso to Sec. 3 of the Immigration Act of 1917, 39 Stat. 874, of reentering temporarily in pursuit of his calling as a seaman. This stipulation was necessary because a deported alien could not return to the United States without advance permission. Act of March 4, 1929, 45 Stat. 1551.[4] The Ninth Proviso[5] merely authorized temporary entry, and in this instance it permitted petitioner to obtain shore-leave upon subsequent trips to the United States as a seaman. It did not authorize petitioner to retain or resume residence in the United States.

The decision below turned on statutory interpretation in an area of limited impact, and the reading it upheld is correct. It poses no problem of conflict-

[4] Now incorporated in Sec. 212(a)(17), Immigration and Nationality Act, 8 U.S.C. 1182(a)(17).

[5] Set forth in the opinion of the court below (Pet. App. 16) and substantially reenacted in Sec. 212(d)(3), Immigration and Nationality Act, 8 U.S.C. 1182(d)(3).

ing judicial decisions. We believe no tenable basis for further review by this Court has been suggested.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 353

IVAN MRVICA,

Petitioner,

—v.—

P. A. ESPERDY, District Director, Immigration & Naturalization Service,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the Court of Appeals (R. 11-14)[1] is reported in 317 F. 2d 220. The opinion of the District Court (R. 6-8) is reported in 202 F. Supp. 214.

Jurisdiction

The judgment of the Court of Appeals was entered May 14, 1963 (R. 14). A petition for a writ of certiorari was filed August 8, 1963 and was granted October 28, 1963 (R. 15). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

[1] Page references are to the Transcript of Record unless otherwise indicated.

Question Presented

Whether a brief physical absence from the United States constitutes a break in the continuous residence required for relief under §249, Immigration and Nationality Act, solely because at the time of departure an order of deportation was pending against the alien.

Statutes Involved

The statutory provision involved is §249 of the Immigration and Nationality Act (8 U. S. C. 1259) as interpreted within the framework of §§101(a)(33) and 101(g) of the Immigration and Nationality Act (8 U. S. C. 1101(a)(33) and 1101(g)). The text of these sections is reproduced in the Appendix, *infra*, pp. 22-23.[1]

Statement of Case

The facts in the case are not at issue. The petitioner applied for permanent residence under §249. His application was denied by the respondent on the ground that, although he entered the United States prior to June 28, 1940 as required by §249(a), an interruption of his physical presence in the United States in 1942, because he left under an order of deportation, constituted a break in the required "continuous residence within the United States (Matter of P—, Interim Decision 976)" (R. 9-10). The United States District Court for the Southern District of New York agreed with this finding (R. 6-8) and was affirmed by the Court of Appeals for the Second Circuit (R. 11-14).

---

[1] References hereafter will be to sections of the Immigration and Nationality Act unless otherwise indicated.

Petitioner, a citizen of Yugoslavia, now 58 years old, was born December 17, 1906 in Zirje, Dalmatia, at the time when that area was part of Austria-Hungary. Following World War I, his birthplace became part of Italy, and after World War II it became part of Yugoslavia. He left his birthplace in 1939 and has not been back since it came under the jurisdiction of the Yugoslav government. He entered the United States on January 21, 1940 on a crewman's permit and has resided in the United States since that time.

In September 1942, when World War II was at its height, petitioner underwent deportation proceedings and was ordered deported as an overstayed crewman. At that time, the sea route to Europe was barred to ordinary traffic and deportation to Yugoslavia was impossible. On the other hand, the United States was in need of able-bodied men, and persons such as the petitioner were encouraged to ship out with the understanding that they would be readmitted upon return from their voyage. The petitioner consented to do this and was granted a waiver under the Ninth Proviso of §3 of the Act of February 5, 1917 for reentry into the United States as a crewman, without special permission of the Attorney General.[3]

He took one round trip to South America on the SS Dubrovska, the trip lasting from October 6 to December 19, 1942. By this departure, the petitioner executed the outstanding order of deportation.[4] When the ship returned

[3] The text of the Ninth Proviso follows:

". . . *Provided further* (9) That the Commissioner of Immigration and Naturalization with the approval of the Attorney General shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of otherwise inadmissible aliens applying for temporary admission. . . ."

[4] §101(g), 8 U. S. C. 1101(g); for text see Appendix p. 23.

from its voyage, the petitioner Mrvica, reentered the United States without difficulty by reason of the permission granted him prior to sailing. There is no evidence in the record that petitioner's "residence in fact" in the United States was interrupted by his short absence. He had registered for the draft in 1940 and had maintained all his ties in the United States, including his bank account and his Union membership. All parties involved, including the Immigration and Naturalization Service, were aware of the fact that he would return to the United States with the same ship, since he had no travel documents which would have facilitated his landing in any other country.

Except for his absence in 1942, the petitioner has not been outside the United States since he first entered in 1940. During the period from 1942 to 1952 no new proceedings were initiated against the petitioner whose presence in the United States, of course, was known to the Service. He was again placed under deportation in 1952, but has been permitted to remain in the United States in connection with his various attempts to adjust his status.[5]

[5] From 1952 to 1956 the petitioner, who is opposed to the present regime in Yugoslavia, attempted to adjust his immigration status, but was unsuccessful in various efforts to do so. From 1956 to 1958 the Immigration and Naturalization Service granted a blanket stay of deportation to all Yugoslavs who under §243(h) (8 U. S. C. 1253(h)) asserted that, if deported to Yugoslavia, they would be subject to physical persecution because of their religious beliefs or political opinions. When in 1958 the Immigration and Naturalization Service resumed deportations to Yugoslavia, the petitioner applied for a refugee visa under P. L. 85-316, a special statute, then in effect. His application was rejected on the ground that he had entered the United States as a crewman. He received an administrative stay in connection with another action, questioning the propriety of such rejection. That action, *Dombrovskis et al.* v. *Esperdy*, was dismissed by the Court of Appeals August 7, 1963, 321 F. 2d 463 (2d Cir. 1963).

Summary of Argument

Petitioner respectfully contends:

The Court of Appeals erred in finding that petitioner's departure under an order of deportation interrupted his continuous residence in the United States and that the grant of Ninth Proviso relief was irrelevant.

Petitioner submits that §249 of the Immigration and Nationality Act, as amended, was meant to create a statute of limitations for long-term residents in illegal status who have shown themselves persons of good moral character, and that the 1958 amendment of the law, by eliminating deportability as a bar to such relief, clearly authorized registry in cases such as that of the petitioner.

The fact that Ninth Proviso relief was granted by the Immigration and Naturalization Service is evidence of the *objective* fact that petitioner had not interrupted his residence during his brief absence from the country.

ARGUMENT

The petitioner has resided in the United States continuously since prior to June 28, 1940.

The issue before the Court is one of statutory construction, namely, whether the facts which are stated above and which are not controverted, fulfill the requirement of §249 (b), that the petitioner has resided in the United States *continuously* since prior to June 28, 1940.

The Immigration and Nationality Act defines "residence" as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, *without regard to*

intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States." (Emphasis supplied.)[6]

It should be noted that not only in this definition, but also in other portions of the Immigration and Nationality Act a deliberate distinction is made between the concept of "residence" and that of "physical presence".

Section 249, which merely requires "residence" is thus distinguishable from "suspension of deportation",[7] another adjustment of status provision which explicitly requires "physical presence," and §316, Immigration and Nationality Act, a naturalization provision which requires both.[8] The distinction between "continuous residence" and "physical presence" is new in the Immigration and Nationality Act. The term "physical presence" is comparatively unambiguous and is not further defined by statute.

"Residence" on the other hand was defined by the Immigration and Nationality Act because in the past it has been the subject of countless court interpretations, the majority of which consider establishment of residence dependent on subjective intent.[9]

The Immigration and Nationality Act explicitly removes the element of "intent" from its definition of "residence".

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[6] §101(a)(33) INA; 8 U. S. C. 1101(a)(33).

[7] §244 INA; 8 U. S. C. 1254.

[8] 8 U. S. C. 1427.

[9] For a general discussion of the term "residence" see Reese and Green, "That Elusive Word 'Residence,'" 6 Vand. L. Rev. 561 (1953). It was described as "a single term of broad and ill defined content, having no exact legal meaning." by Goodrich *J.* in *United States* v. *Stabler*, 169 F. 2d 995, at 998 (3rd Cir. 1948).

The congressional intent presumably was to place into statutory language the ruling of the United States Supreme Court in *Savorgnan* v. *United States*, 338 U. S. 491 (1949). In that case the petitioner's citizenship depended on whether, in the period from 1941 to 1945 she had her residence in Italy, where she was physically, or in the United States, where she had lived before that time. Her position was, that she had been in Italy only temporarily and not with the *intention* of establishing a "permanent residence," and that she had always intended to retain her permanent residence in the United States. The United States Supreme Court, in discussing this contention states, at pp. 504-505:

> "The petitioner's residence abroad met the requirements of the Act of 1940. Sec. 403(a) and 104 used the terms 'residence' and 'place of general abode' without mention of the intent of the person concerned. The act cleared up the uncertainties which had been left by early decisions as to the type and amount, if any, of residence abroad that was required to establish expatriation. In contrast to such terms as: 'temporary residence,' 'domicile,' 'removal, with his family and effects,' 'absolute removal' or 'permanent residence,' the new Act used the term 'residence' as plainly as possible to denote an objective fact. To identify the required 'place of residence,' it required only that it be the 'place of general abode.' . . ." [10]

The Court referring to the legislative history of the statute involved, concluded that it was irrelevant whether Mrs. Savorgnan *intended* to establish residence in Italy or *intended* to maintain a permanent residence in the United

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[10] Footnotes omitted. One footnote points out that where "permanent residence" was intended, the statute used the term. (It might be suggested that where "lawful" residence or "physical presence" is intended the statute also uses the appropriate terms.)

States. Her "place of general abode" for four years had been Italy and that objective fact was decisive for determination of her residence.

It is submitted that by this reasoning which has been codified in the definition of residence in §101(a)(33), petitioner's "place of general abode" was the United States ever since January 1940 and neither *his* intention, nor that of the respondent could change that *objective* fact. During the petitioner's brief absence all parties involved knew that as a matter of objective fact, he resided in the United States and by necessity would return to this "place of general abode." [11]

The Immigration and Naturalization Service has recognized that the residence requirement of §249 is not identical with uninterrupted physical presence.

In Matter of P—, Interim Decision 976,[12] the very decision which was the basis for the denial of the petitioner's application (R. 9), the Assistant Commissioner for Immigration approved the decision made by a Regional Commissioner that,

> ". . . An alien who has been absent from the United States at any time since the entry upon which his application is based may be found to have resided continuously in the United States since the date of his original entry if his absence was temporary and his principal

[11] For a comprehensive discussion on the concept of "continuous residence", albeit, in connection with loss of citizenship, see 53 Colum. L. Rev. (1953), L. Gordon, *Loss of Citizenship by Continuous Residence Abroad*, 451-475, where the interpretation most often given to the term "residence" is the country where a person "was physically present a majority of the time, and, if he was not present that long in any one country, then the country in which he was present for the longest period" (p. 459).

[12] Published 8 I. and N. Dec. 167-169.

actual dwelling place in fact remained in the United States during the entire period of his absence" (at p. 169).

The same opinion however states that "a departure from the United States as a result of exclusion or expulsion proceedings breaks the continuity of residence for the purpose of §249, regardless of the period of time the alien is outside the United States after such departure," (*ibid.*). No precedent is cited, or other reason given for the distinction. The Courts below affirmed this ruling. See also *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292 (N. D. Cal. 1960), affirmed per curiam, 287 F. 2d 561 (C. A. 9, 1961); *Lum Chong* v. *Esperdy*, 191 F. Supp. 935 (S. D. N. Y. 1961), both of which are distinguishable on the facts to the extent that in both cases the aliens left the United States at the conclusion of the war, when deportation was a practical possibility, so that their return was not as inevitable as that of the petitioner. In one of the cases, there was no advance permission to return.

The Court below, referring to the petitioner's situation, conceded that it is difficult to believe "that a merchant ship at sea in a time of worldwide naval war is . . . to be considered in retrospect as having been a 'place of general abode'" (R. 13). However, taking into consideration §101(g)[13] which provides that any alien ordered deported, who has departed from the United States, has thereby executed the deportation order, the Court concluded that petitioner's departure under such circumstances did interrupt his residence.

It is respectfully submitted that this conclusion is erroneous and that it intermingles two factual terms, namely, "physical presence" and "residence in fact" with a purely

[13] 8 U. S. C. §1101(g), for text see Appendix, p. 23.

legal and really a fictitious term, namely, the "execution of a deportation order." There might be justification in the position if Congress had not explicitly removed the element of subjective intent from the concept of "residence". It should be impossible for an alien to retain his residence in the United States by reserving the *intention* of retaining his residence while being deported, thereby mentally clinging to a residence to which as a matter of law he is not entitled. But Congress reduced the issue to a purely factual one, and §101(g) notwithstanding, the facts in existence at the time when the events in question took place, made it impossible for either the petitioner or the respondent to interrupt the petitioner's residence "in fact." The petitioner had one place of general abode only, namely the United States. This result is entirely in keeping with the humanitarian purpose of §249 and its legislative history.

Historical Background

The institution of "registry" originated with the Act of March 2, 1929 (45 Stat. 1512). It applied to aliens who had arrived before the temporary quota law of June 3, 1921 and permitted creation of a record of lawful entry for permanent residence on behalf of those who could meet certain prescribed conditions. Its purpose was to legalize the residence of aliens who had entered improperly before that date, but whose deportation was precluded by the statute of limitations then in effect.[14] The registry statute was codified in the Nationality Act of 1940. The only significant change was to advance the controlling date to July 1, 1924, the

[14] For discussion of legislative history, see Bernsen, Acquisition of Lawful Permanent Residence, 8 I & N Reporter, 3 (1959); Gordon and Rosenfield, "Immigration Law and Procedure," Banks & Co. (1959) and Supplements, 735-736. Also Codification of the Nationality Laws, House Committee Print, 76th Cong., 1st Sess. (1939), p. 41.

effective date of the basic quota law. The 1952 Act retained the registry provision of the 1940 Act. A person subject to deportation was not entitled to registration under that provision.[15]

A revision of significance for the petitioner, who prior to that date clearly was not covered by the statute, occurred in 1958.[16] The cut-off date for eligible aliens was advanced to June 28, 1940 (the effective date of the Alien Registration Act of 1940, 54 Stat. 670). The more significant change, however, was that the amendment eliminated the disqualification heretofore existent, of persons who are deportable. This statutory change made the benefits of the statute available to persons of good moral character, even though they were deportable, provided that they are not inadmissible as criminals, subversives or other undesirables.

A situation, such as that now before the Court, was not mentioned in the legislative history of the provision, but a comparative reading of §249 as enacted in 1952 and its 1958 amendment shows that the interpretation urged upon this Court would clearly fulfill the humanitarian purpose of the amendment.

Immigration & Nationality Act of 1952	*Immigration & Nationality Act as Amended by Act of August 8, 1958*
Sec. 249(a). A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, if	(a) A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, *as of*

[15] §328(b), Nationality Act of 1940 (54 Stat. 1152); §249(a)(4) (1952).

[16] Act of August 8, 1958 (72 Stat. 546).

Immigration & Nationality Act of 1952	*Immigration & Nationality Act as Amended by Act of August 8, 1958*
no such record is otherwise available and such alien shall notify the Attorney General that he—	*the date of approval of his application, or, if entry occurred prior to July 1, 1924, as of the date of such entry,* if no such record is otherwise available and such alien shall satisfy the Attorney General that he *is not inadmissible under section 212 (a), insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—*[17]
(1) entered the United States prior to July 1, 1924;	(1) entered the United States prior to *June 28, 1940;*
(2) has had his residence in the United States continuously since such entry;	(2) has had his residence in the United States continuously since such entry;
(3) is a person of good moral character;	(3) is a person of good moral character;
(4) *is not subject to deportation;*[17] and	
(5) is not ineligible to citizenship.	(4) is not ineligible to citizenship.

[17] Italicized portion in 1952 Act was deleted by amendment. Italicized portions in 1958 Act were added by amendment.

The effect of the deletion of §249(a)(4) from the 1952 Act was to create a statute of limitations for illegal entrants or overstays who have resided in the United States for many years and have proved themselves to be good members of their community. The legislature has indicated beyond doubt that illegality of status and deportability are not considered a disqualification under the provision.

Subsequent legislation should be considered in connection with the interpretation of prior legislation upon the same subject, *Great Northern Railroad Co.* v. *United States,* 315 U. S. 262, 86 L. Ed. 836. The reverse also is true, and the change in the law which deleted *clause* (4) above, must be considered of significance in the interpretation of the amended statute.

The government's brief in opposition to the petition for certiorari (p. 4 fn. 2) mentions an abortive attempt of the legislature in 1962 to amend §249 by moving the cut-off date from June 28, 1940 to December 24, 1952. Since petitioner does not claim to come within the scope of the law by reason of his 1942 entry, the injection of the point is irrelevant, but lest erroneous and adverse inferences be drawn from the language used in the government's brief, "that in 1962 Congress considered and rejected" such an amendment, and excluded former crewmen (such as this petitioner) from the substitute remedy, a brief legislative history of this development must be included in the brief in order to set the record straight.

Congressional history indicates that Congress did not have an opportunity "to consider and reject the amendment," which in fact was defeated in a legislative maneuver on the last day of the second session of the 87th Congress. The Congressional Record is replete with criticism of the method used in connection with the procedure followed to secure passage of this legislation.

The original proposal to move the cut-off date to December 24, 1952 was first introduced by the late Representative Francis E. Walter of Pennsylvania, then chairman of the House subcommittee on immigration and the acknowledged leader in the field of immigration legislation and sponsor of practically every successful legislative proposal dealing with amendments of the Immigration and Nationality Act of 1952, also known as the "Walter-McCarran Act." On May 24, 1962, he introduced *H.R. 11911*, a bill "to facilitate the entry of alien skilled specialists and certain relatives of United States citizens; and for other purposes."

The first *three* sections of the bill related to oversubscribed quotas. There was considerable political pressure brought to have vastly oversubscribed preference quotas changed to nonquotas because skilled specialists and close relatives of American citizens were waiting endlessly on the quota registration lists.

The *fourth* section of the bill was the proposed amendment of §249. The draft had been submitted to Congressman Walter by the Department of Justice, accompanied by a letter from the Attorney General urging that it be enacted.

On May 24, 1962, the bill, including Sec. 4 was reported favorably by Mr. Walter's "Subcommittee on Immigration and Nationality." There was no indication that Mr. Walter, the sponsor of the bill, was in any way opposed to its enactment. Controversy arose in Congress with regard to the first and second sections of the bill because they would, in their original form, have permitted immediate immigration of 65,000 aliens. Some of the legislators felt that this was too large a number, and *H.R. 11911* was stalled in the Committee on the Judiciary of the House. Yet, the

Immigration and Naturalization Service, with the consent of Congress, administratively recognized the probable enactment of Sec. 4, and in June, 1962 permitted publication of an administrative policy, that pending action on *H.R. 11911* no deportation orders pertaining to long-term resident aliens would be carried out.[18]

Almost simultaneously with *H.R. 11911*, an identical bill, *S. 3361* was introduced in the Senate. As action was stalled in the House, the Senate Committee on the Judiciary, on October 4, 1962 at the end of the session, reported the bill favorably. In its report, accompanying the bill, the Committee stated:

> "*Section 4* of the bill, as amended, would amend section 249 of the Immigration and Nationality Act, as amended (66 Stat. 219), to permit the creation of a record of lawful admission for permanent residence in the cases of certain aliens who entered the United States prior to December 24, 1952. Under existing law such an adjustment may be made in the cases of certain aliens who entered the United States prior to June 28, 1940." [19]

Included in the report was a memorandum from the Department of Justice, which, among other things, contained the following information:

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[18] *Interpreter Releases*, Vol. 39, No. 23, "Important News for Long-Term Alien Residents," June 7, 1962, p. 172. The entire legislative history of the provision, taken from the *Congressional Record* and reports of Congressional committees, was traced in *Interpreter Releases*, an Information Service on Immigration, Naturalization, and Related Problems, Vol. 39, No. 25, June 29, 1962, pp. 177-188; No. 34, August 29, 1962, pp. 230-235; No. 42, October 29, 1962, pp. 280-286, published by the American Council for Nationalities Service, and edited by Counsel for petitioner.

[19] *Senate Rept. No. 2276*, 87th Cong. 2nd Sess. (1962) to accompany *S. 3361*, p. 2.

"At the present time, Chinese and other aliens chargeable to heavily oversubscribed quotas who entered subsequent to June 28, 1940, are in large part statutorily ineligible for relief from deportation, notwithstanding that deportability is based upon grounds which do not reflect adversely upon their moral character or desirability as permanent residents. Adoption of a proposed amendment to section 249 of the Immigration and Nationality Act to move the cutoff date forward to December 24, 1952, the effective date of that act, would permit adjustment and eventual naturalization to otherwise eligible residents whose conduct over the years has demonstrated their desirability as residents" (Rept., p. 5).

The Senate one day later passed *S. 3361*, on the consent calendar, including its Sec. 4, in the original form. Several of the Senators expressed their regret that the bill was not more generous, but because of the advanced date of the calendar and the fact that Congress was ready to go home, it was evident that if they would vote against the bill, because it was too narrow, no immigration bill would be passed at all.

On October 5, one day after the Senate had acted on *S. 3361*, Representative Walter asked unanimous consent of the House for immediate consideration of the bill, pointing out that Subcommittee No. 1 of the Committee on the Judiciary of the House—of which he was the chairman—had previously approved the bill.

In the brief floor discussion, Representative Moore asked that Sec. 4 be stricken because, according to him, it would "make it profitable to hide out for a prolonged period of time." [20]

[20] 108 Cong. Rec., 21417 (1962).

Representative Judd asked for an explanation of the term "hide out" used above, and Representative Walter stated:

> "Well, under the law, where an alien has been in the United States prior to June 28, 1940, and where upon application it is found that he is of good moral character and is not a criminal or subversive, then his status may be adjusted regardless of how long he has been in hiding.
>
> The other body (sic) changed that date from June 28, 1940 to December 24, 1952. We do not think that this should be done. We think it puts a premium on the ability to hide. If there are meritorious cases, then we feel we can deal with them adequately through existing suspension of deportation laws or through private legislation. As a matter of fact, I do not think there were more than 15 such cases brought to the attention of your committee under section 244(a)(4) of the immigration code, in this session." [21]

Mr. Walter failed to mention that he had originally introduced the provision and that his committee had recommended it favorably. The bill was amended as suggested, with a minimum quorum present. A number of congressmen who had been absent expressed dissatisfaction with the action. Representative Rooney of New York was particularly upset. He said:

> "Mr. Speaker, I have just now learned that during my absence within the hour in the old Supreme Court Chamber here in the Capitol presiding at a conference with conferees of the other body on the bill H.R. 12580 making appropriations for the Departments of State,

[21] 108 Cong. Rec., 21417.

Justice, and Commerce, the Judiciary, and related agencies for fiscal year 1963, the gentleman from Pennsylvania [Mr. Walter], called up the bill S. 3361. I now learn that this bill which was passed by the other body earlier today has now been passed in the House with two amendments: one, accepted by the gentleman from Pennsylvania striking out section 4 and the other offered by the gentleman from Pennsylvania creating a new Assistant Secretary of State.

I am utterly appalled at all this since the gentleman from Pennsylvania has continually assured me since the month of June 1962, that if the distinguished senior Senator from Rhode Island [Mr. Pastore], obtained passage of this bill in the other body that he, the gentleman from Pennsylvania and his committee would accept it. Instead of this bill, and I introduced a similar bill, H.R. 12369 on June 29, 1962, at the suggestion of the gentleman from Pennsylvania, being now on its way to the White House for signature, it has been amended contrary to the assurances given me many times since last June." [22]

With the floor amendments, the bill was returned to the Senate on the same day. The Senate disagreed with the House and a conference committee submitted a report to both Houses on October 13, 1962. Congress adjourned on Saturday, October 14, 1962, so that neither House had a representative group present when the bill was finally passed on that date with a very complicated substitute Sec. 4, several pages long and consisting of a recodification of the suspension of deportation provision of the Immigration and Nationality Act. This substitute appeared for the

[22] 108 Cong. Rec., No. 182, October 5, 1962, 21418 (1962). Representative Rooney at a later date had the above-quoted passage expunged from the Congressional Record.

first time in the conference report and thus had not been before the Committees on the Judiciary of either House.

As stated before, the preceding legislative history is irrelevant to petitioner's claim, but was inserted in the brief because the failure of the amendment should not be construed as an expression of Congressional intent with regard to the law as it presently exists.

Significance of *Rosenberg* v. *Fleuti*

Although there is no direct Supreme Court precedent for the petitioner's case, the recent decision in *Rosenberg* v. *Fleuti*, 374 U. S. 449 (1963) permits analogous reasoning. Even though *Rosenberg v. Fleuti* did not deal with the status of an alien who left the United States under a deportation order, *Fleuti*, in the opinion of the Service, became deportable because he was excludable once he reentered, and to that extent the two cases are interrelated.

The issue in the *Mrvica* case is a different one; it turns on the definition of "residence" while *Fleuti* addressed itself to the definition of "entry."[23] The Service has consistently ruled that continued physical presence is not one of the requirements of §249.

This Court in the *Fleuti* decision, however, stresses the fact that the concept of "continuous residence" has been liberalized by the 1952 Act. Under that decision, it may be argued that Mrvica did not even make a new entry when he returned with his ship in 1942. §249 does not make this necessary to bring him within the statute, but it would clinch the argument that the petitioner did not interrupt his residence in the United States at any time.

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[23] §101(a)(13) (8 U. S. C. 1101(a)(13)).

Significance of Advance Permission to Return

The fact that the petitioner received advance permission to return[21] was emphasized in the briefs for petitioner, not to establish that he reentered lawfully in 1942, but only to prove that he never interrupted his "residence in fact." Yet, the District Court, apparently misunderstanding the argument, not only rejected the grant of "advance permission to return" as irrelevant to the issue, but stated that even if it were to be considered, " . . . it only provided that the plaintiff be permitted shore leave in the future if he returned to this country as a *bona fide* seaman" (R. 8), but that plaintiff did not return "as a *bona fide* seaman," and therefore was not eligible for the benefits of the Ninth Proviso (*ibid.*). Again, the Court of Appeals, pointing to the 1942 entry states, that it was illegal and that to ignore such illegal reentry after the cut-off date, would amount to aggregating two illegal periods of residence to make one continuous period, a thought process, which the Court of Appeals believed was not within the scope of §249.

Although the "advance permission to return" was merely used as another element in the continuity of residence, in view of the fact that both the Court of Appeals and the District Court in this case commented on the illegality of the second entry, and the fact that the petitioner could have at a later date departed voluntarily, it should be stressed that §249 is considered to be available only in cases where there is no record of lawful entry, and that Congress enacted the law for the benefit of aliens illegally in the United States who are, except for their illegal entry, persons of good moral character and deserving of administrative discretion.

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[21] Ninth Proviso of §3, Immigration Act of 1917.

A number of administrative decisions extend the remedy to persons who entered illegally and even fraudulently.[23] If a fraudulent entry does not bar an individual from the remedy, the fact that the petitioner entered under a Ninth Proviso grant, yet did not comply with the terms of admission, certainly has no bearing on his eligibility for the remedy.

It is submitted that the history of §249 justifies a construction of the statute to the effect that the petitioner and persons like him come within its scope. The petitioner has been a law-abiding resident of the United States for 25 years, and deportation would create a great hardship. Moreover, it would make no sense, since his presence in the United States has been tolerated, if not welcomed for 25 years. It is submitted that Congressional action is not necessary for cases such as that of the petitioner, if the statute is interpreted in the humanitarian spirit in which Congress had enacted it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

EDITH LOWENSTEIN
Counsel for Petitioner Ivan Mrvica

January 1964

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[23] Gordon and Rosenfield, "Immigration Law and Procedure" (1959), p. 737, 1963 Supplement, p. 737, n. 49; Matter of S—, 8 I. and N. Dec. 288 (1959).

APPENDIX

Statutes Involved

Section 249 (8 U. S. C. 1259) as amended:

A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

Sec. 101(a) 33 (8 U. S. C. 1101(a)(33)):

* * * * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352

of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.

Sec. 101(g) (8 U. S. C. 1101(g)):

For the purposes of this Act any alien ordered deported (whether before or after the enactment of this Act) who has left the United States, shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed.

Proof of Service

I, EDITH LOWENSTEIN, counsel for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of January, 1964, I served copies of the foregoing brief on the Solicitor General, Department of Justice, Washington 25, D. C., the attorney for the Respondent, P. A. Esperdy, District Director, Immigration & Naturalization Service, by mailing copies in duly addressed envelopes, with first-class postage prepaid.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 353

IVAN MEVICA, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (R. 11–14) is reported at 317 F. 2d 220. The opinion of the district court (R. 6–8) is reported at 202 F. Supp. 214.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1963 (R. 14). The petition for a writ of certiorari was filed on August 8, 1963, and was granted on October 28, 1963 (R. 15). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner, a Yugoslav crewman, has maintained continuous residence in the United States since his entry so as to qualify for adjustment of status although, after his entry, he was ordered deported and effectuated his deportation by obtaining employment as a crewman on a Yugoslav merchant vessel and leaving with that vessel on a foreign voyage.

STATUTES INVOLVED

Section 101(a)(33) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101(a)(33), provides:

> The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of section 1482 and 1484 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.

Section 249 of the Immigration and Nationality Act of 1952, as amended in 1958, 72 Stat. 546, 8 U.S.C. 1259, provides:

> A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall sat-

isfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—

(a) entered the United States prior to June 28, 1940;

(b) has had his residence in the United States continuously since such entry;

(c) is a person of good moral character; and

(d) is not ineligible to citizenship.

The "ninth proviso" to section 3 of the Act of February 5, 1917, 39 Stat. 874; 8 U.S.C. (1940 ed.) 136(q), provided:

> *Provided further,* That the Commissioner General of Immigration [1] with the approval of the Secretary of Labor shall issue rules and prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission of otherwise inadmissible aliens applying for temporary admission.

STATEMENT

Petitioner is a 58 year old native and citizen of Yugoslavia who first entered the United States at Baltimore, Maryland, on January 21, 1940, as a non-

[1] Under Reorganization Plan No. V, which became effective on June 14, 1940 (54 Stat. 230), the Immigration and Naturalization Service and its functions were transferred to the Department of Justice for administration under the direction and supervision of the Attorney General. 54 Stat. 1238.

immigrant crewman attached to a Yugoslav merchant vessel[1] (R. 3; G. Ex. 1, pp. 11, 15, 25, 31, 39, 60).[2] He was issued a temporary landing permit but remained in the United States longer than allowed (R. 3).[3] On September 4, 1942, he was ordered deported to Yugoslavia (R. 3; G. Ex. 1, p. 11). The warrant of deportation provided, in part (G. Ex. 1, p. 11):

> * * * If the alien returns to the United States from time to time and upon inspection is found to be a bona fide seaman and entitled to shore leave, except for prior deportation, admission under the 9th Proviso of Section 3 of the Act of February 5, 1917, in reference to this ground of inadmissibility is hereby authorized for such time as the alien may be admitted as a seaman.

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[1] Petitioner's vessel, at the time of his first entry, was the *S.S. Serafin Topić* (G. Ex. 1, pp. 11, 14a, 59a, 60). His former attorney stated before the Board of Immigration Appeals that petitioner arrived in the United States on board a "Yugoslav vessel" (G. Ex. 1, p. 39). *Lloyd's Register of Shipping 1939–1940*, entry number 33,448 of the section on "Steamers and Motorships of 300 Tons Gross and Over" and p. 182 of "Shipowners" section, shows that the *S.S. Serafin Topić* sailed under the Yugoslav flag, that its port of registry was Susak (a port in Northern Yugoslavia), and that its owner was "Slobodna Plovidba Topić," with addresses in Susak, Yugoslavia, and Trieste, Italy.

[2] "G. Ex. 1" refers to the administrative record of the case which was submitted to both courts below and has now been lodged with Clerk of this Court.

[3] Counsel's representation to the Board of Immigration Appeals that, after his initial entry in January, 1940, petitioner rebearded his ship and re-entered the country in 1941 (G. Ex. 1, p. 39), is apparently incorrect (see R. 5; G. Ex. 1, p. 59a, answer 14i). But, in any event, the only contention here (as below) is that petitioner's residence was interrupted by his departure in 1942, pursuant to an order of deportation.

Shortly thereafter, petitioner obtained employment as a crewman on the Yugoslav vessel *S.S. Dubravka*, which was docked in San Pedro, California (G. Ex. 1, pp. 1–3, 25, 31).[1] On September 28, 1942, an Immigration Inspector completed a Form 535, "Description of Person Deported", pertaining to the petitioner, with the notation "Has Jugo Slav passport #173/1942" (G. Ex. 1, p. 1). On October 6, 1942, the *S.S. Dubravka*, with petitioner on board, sailed from San Pedro on a foreign voyage. His departure was verified by an Immigrant Inspector who marked the warrant of deportation as executed and notified the New York District Director that the petitioner had left on the Yugoslavian vessel. (G. Ex. 1, pp. 1, 3, 11; see G. Ex. 1, p. 2).

The *S.S. Dubravka* proceeded to Talta, Chile, where the ship docked and took on a mineral cargo (G. Ex. 1, pp. 12, 25, 27). After Talta, the vessel, with petitioner still on board, stopped at Antofagasta, Chile, where the crew list was visaed (G. Ex. 1, pp. 12, 25). There is no indication whether petitioner disembarked at either of the Chilean ports. The ship then sailed to San Pedro, California, arriving on December 19, 1942 (G. Ex. 1, pp. 12, 31; see p. 24). An Immigration

[1] See *Lloyd's Register of Shipping 1941–1942*, section on "Steamers and Motorships of 300 Tons Gross or Over", entry number 22,681, and p. 51 of "Shipowners" section, which shows that the *S.S. Dubravka* sailed under the Yugoslav flag, that its port of registry was Dubrovnik (a port in southern Yugoslavia, and that its owner was "Dubrovnaka Plovidba", with an address in Dubrovnik, Yugoslavia, and one apparently in England. See also, *Lloyd's Register of Shipping 1942–1943*, entry number 72,636 and p. 52 of the respective sections.

officer boarded the vessel and ordered petitioner "detained on board at all U.S. ports & deport." (G. Ex. 1, pp. 12, 31). A few days later, the *S.S. Dubravka* proceeded to San Francisco, California, where petitioner was allowed to come ashore for medical treatment (G. Ex. 1, pp. 22, 24, 26, 27, 31; see pp. 12, 32).[a] Thereafter, petitioner apparently remained "unnoticed in this country for a period of more than seven consecutive years" (see G. Ex. 1, p. 31).[b]

In March 1952, new deportation proceedings were commenced against petitioner. After a hearing, petitioner was found deportable as an immigrant not in possession of a valid, unexpired immigrant visa, but was granted the privilege of voluntary departure (G. Ex. 1, pp. 30–31). The decision was affirmed by the Assistant Commissioner (G. Ex. 1, p. 34) and the Board of Immigration Appeals dismissed petitioner's appeal from that part of the order denying him suspension of deportation (G. Ex. 1, p. 40). Thereafter, petitioner was ordered deported to Yugoslavia, but that order was stayed administratively (see G. Ex. 1, 45, 49). In August 1956, the Board of Immigration Appeals withdrew the outstanding order and warrant of deportation and again granted petitioner the privi-

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[a] The government's brief in opposition (p. 3) erroneously states that petitioner was admitted as a seaman for shore leave pursuant to the waiver in the deportation order.

[b] The hearing examiner in the 1952 proceedings noted that petitioner had registered under the Selective Service Act of 1940 (G. Ex. 1, p. 32). His application for suspension of deportation filed in those proceedings indicated that he had registered under the Alien Registration Act (G. Ex. 1, p. 14). But the record does not show the dates of registry.

lege of voluntary departure (G. Ex. 1, pp. 55–56). After another administrative stay, an order was entered in October 1959, directing petitioner's deportation to Yugoslavia (G. Ex. 1, pp. 58, 59).

Petitioner thereafter applied for adjustment of status under Section 249 of the Immigration and Nationality Act (G. Ex. 1, p. 60). The application was denied by respondent on the ground that petitioner's deportation in 1942 constituted a break in his continuous residence in the United States after 1940 (R. 9; G. Ex. 1, p. 61). That decision was affirmed by the Regional Commissioner (R. 10; G. Ex. 1, p. 69).

The instant proceeding was commenced on June 21, 1960, when petitioner filed a complaint in the district court to review the administrative denial of Section 249 relief (R. 3–5). On February 21, 1962, summary judgment was entered for the respondent (R. 8; see R. 6–8). The court of appeals affirmed the decision on May 14, 1963 (R. 14; see R. 11–14).

ARGUMENT

INTRODUCTION AND SUMMARY

Section 249 of the Immigration and Nationality Act of 1952 permits the Attorney General to regularize the status of certain categories of aliens illegally in the country if specified conditions are satisfied. Among the prerequisites for obtaining permanent resident status—"registry" as it is commonly termed—are (1) entry prior to June 28, 1940, and (2) continuous residence in the United States thereafter. Having entered in January, 1940, petitioner meets the first condition. But he left the

country, under an order of deportation, in 1942, and remained absent, aboard a vessel of his own nation, for two and a half months. The only question here is whether that departure effected a break in his United States residence. If so, petitioner plainly does not qualify for relief under Section 249.

On the face of it, there would seem little room for argument. Petitioner was deported; he did not take an accidental or casual trip abroad. Though the means were of his own choosing, he left under compulsion of a final order of deportation. Nor did his "voluntary" departure defeat deportation. Petitioner himself concedes, as he must, that his leaving "executed the outstanding order of deportation." And, while the bar to his temporary re-entry as a seaman was lifted, his deportation finally closed the door to petitioner's resuming permanent residence here. These facts alone, it seems to us, establish a break in petitioner's residence in the United States. For expulsion is plainly inconsistent with continued residence. And that result, we think, does not depend on where the alien goes or how long he stays away. But, here, in any event, any possible doubt is resolved by the substantial absence involved and the fact that petitioner, on leaving the United States, resumed his former residence aboard a vessel under the jurisdiction of his own nation.

Petitioner's answer seems to be that his deportation was a mere "legal fiction," because, in light of the wartime conditions then prevailing, everyone knew that petitioner would shortly return; indeed, says he, "he was encouraged to ship with the under-

standing that [he] would be re-admitted upon return from [his] voyage." The rebuttal to this contention is twofold: (1) Insofar as it asserts petitioner's subjective desire to retain his American residence and return to it, the point is wholly irrelevant since the Immigration and Nationality Act expressly provides that residence shall be determinned "without regard to intent;" and (2) insofar as the claim is that the Immigration Service viewed his departure as temporary and legally insignificant, or misled petitioner into so viewing it, the allegation is wholly unfounded.

Because it seems the only relevant point in dispute, we address ourselves first (Point A) to the notion of an "understanding" through which petitioner might leave the country without consequence. We note that petitioner does not allege any particular agreement between himself and Immigration officials. To be sure, the original deportation order permitted petitioner, despite being a deportee, to enjoy temporary "shore leave" if he should return to one of our ports as "a bona fide seaman." But this was hardly an invitation to resume permanent residence in the United States as a shoreside worker. On the contrary, when he left, the Immigration Service noted his departure with a Yugoslav passport and marked their deportation warrant "executed." Nor is there merit in petitioner's contention that the Service must have viewed petitioner's departure as only temporary in light of the "practical impossibility" of deporting him during the war. The historical fact is that the Service (confirmed in its view a year later

by Congress) then followed the practice of deporting alien seamen whose homelands were occupied to the place where their government-in-exile was established, and that Great Britain, where the Yugoslav government was then located, welcomed such homeless seamen.

We turn next (Point B) to the proposition that the fact of deportation is inconsistent with the claim of continued residence in the United States, which is supported both by principle and precedent. And, finally (Point C), we show that, in the present circumstances, there was a clear break in the petitioner's United States residence, when he resumed his former residence aboard a Yugoslav vessel.

PETITIONER'S DEPORTATION FROM THE UNITED STATES AND SUBSEQUENT ABSENCE IN 1942 CONSTITUTED A BREAK IN THE CONTINUITY OF HIS RESIDENCE IN THE UNITED STATES FOR PURPOSES OF SECTION 249

A. PETITIONER WAS ACTUALLY DEPORTED WITH NO ENCOURAGEMENT TO RETURN TO THE UNITED STATES

We deal first with the suggestion that petitioner's departure in 1942 was somehow not a *bona fide* deportation.

1. As petitioner seems to concede (Pet. Br. 3, 9–10), his departure on a Yugoslav vessel in October 1942, after a final order of deportation had been entered against him, was, in law, a deportation. Indeed, the applicable statute (8 U.S.C. (1940 ed.) 180(b)),[9] ex-

[9] Section 1(b) of the Act of March 4, 1929, 45 Stat. 1551. That statute made it a felony for a deportee to re-enter or attempt to re-enter the United States and defined the term "deportation" for purposes of the Act. The provision was

plicitly provided that "any alien ordered deported (whether before or after March 4, 1929) who has left the United States shall be considered to have been deported in pursuance of law, irrespective of the source from which the expenses of his transportation were defrayed or of the place to which he departed." See *Corsetti* v. *McGrath*, 112 F. 2d 719 (C.A. 9). The legislative history of this provision confirms the obvious: that Congress intended that an alien, like the petitioner, who voluntarily departed from the United States after entry of a final order of deportation, was to be considered deported. House Rep. 2418, 70th Cong., 2d Sess. at p. 6.[7]

As a matter of law, petitioner was deported. Moreover, his departure was so treated by the Service at the time. We have already noted that, a few days before his vessel sailed, an Immigration Inspector completed a personal description form for petitioner as a deportee, noting his impending departure as a seaman aboard the *S.S. Dubravka* and the fact that

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carried forward in Section 101(g) of the Immigration and Nationality Act of 1952, applicable to the Act as a whole.

[7] That report stated in part (*ibid.*):

"Owing to the inadequacy of the appropriations now made for enforcement of deportation provisions under existing law, the Department of Labor has, in many cases, after a warrant of deportation has been issued, refrained from executing the warrant and deporting the alien, at the expense of the appropriation, to the country to which he might be deported, upon the condition that the alien voluntarily, at his own expense, leave the United States. Some doubt exists whether an alien so departing has been 'deported.' Subsection (b) of section 3 of the bill therefore removes any possible doubt on this question by providing that in such cases the alien shall be considered to have been deported in pursuance of law."

he held a Yugoslav passport. And, on the day the ship left San Pedro, the deportation warrant was endorsed as executed.

2. Petitioner nevertheless asserts that, legal "fictions" aside, it was a "practical impossibility" to deport him and that the Service contemplated, indeed encouraged, his return. That claim, supported only by petitioner's self-serving affidavit filed in the district court (R. 5–6), is wholly unfounded.

The fact is that the government of the United States took all the steps it could to prevent the return of deserting seamen by deporting them, whenever possible, to the jurisdiction of the government of which they were nationals. The chief deportation problem of the Immigration and Naturalization Service during World War II was that of deserting alien crewmen. Section 20 of the Act of February 5, 1917, 39 Stat. 874, 890, 8 U.S.C. (1940 ed.) 196, which designated the countries to which aliens were to be deported, provided, in part:

> That the deportation of aliens provided for in this Act shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; * * * or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

It made no special provision for the deportation of aliens whose homeland had been overrun and occupied by the armed forces of another country.

Since it was a practical impossibility to deport deserting alien seamen to countries whose territory was occupied by enemy forces, the Immigration and Naturalization Service, during World War II, adopted the practice of deporting such seamen to the country in which their government-in-exile was located or to the foreign port from which they embarked for the United States. See H. Rep. 211, 78th Cong., 1st Sess., pp. 1–2; S. Rep. 156, 78th Cong., 1st Sess., pp. 1–2; 89 Cong. Rec. 2381, 2386. And since most of the overrun European countries, including Yugoslavia, had established a government-in-exile in England, each of which was recognized by the United States as the legal government of the particular country (89 Cong. Rec. 2381; *Documents on American Foreign Relations*, 1940–1941, Vol III, pp. 331–334),[8] most of the deportations in question were to England. 89 Cong. Rec. 2381, 3186. *Ibid.* This arrangement was satisfactory both to England and to the governments-in-exile since the services of the seamen-deserters were urgently needed. For the "first twelve months" of

[8] On April 17, 1941, after an eleven day onslaught by massed axis forces, Yugoslavia capitulated and King Peter fled the country. A Yugoslav Government-in-exile was first established in Cairo, Egypt, and, after the fall of Crete, moved to London in mid-June 1941. The Yugoslav cabinet was reorganized, and the new government was recognized by the Allied Powers as a member of the United Nations. See Miller, *War in Korea and History of World War II* (1955 ed.), pp. 272–279.

World War II—from about December 1941 to about December 1942—the Service deported most of the deserting seamen to the United Kingdom with the result that there were "practically no desertions from the ships because we were deporting them to the country where the government in exile was located." 89 Cong. Rec. 3186.

In 1943, Congress expressly ratified the wartime practice.* The occasion was a sharp increase in seaman desertions encouraged by a district court ruling, later reversed, holding that deportation must be to the territorial, not the political, jurisdiction of the alien's country. See *Delany* v. *Moraitis*, 46 F. Supp. 425 (D. Md.), reversed, 136 F. 2d 129 (C.A. 4). The legislative history of the measure clearly discloses Congress' concern that immunity from deportation would encourage desertions by alien seamen and impair the war effort of the allied powers. See H. Rep. 211, 78th Cong., 1st Sess., p. 2; S. Rep. 156, 78th Cong., 1st Sess., p. 2; 89 Cong. Rec. 2381, 2382, 3186–3187.

Plainly, the public policy of this government did not encourage petitioner to return to the United States

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*The Act of July 13, 1943, 57 Stat. 553, now Section 243 of the 1952 Act, 8 U.S.C. 1253(g), authorized the wartime deportation of aliens whose countries territorially were occupied by enemy forces to consenting countries where their recognized governments-in-exile were located; or, if the recognized governments had not established themselves in exile, then to countries which were "proximate" to the countries of which the aliens were citizens or subjects, or, with the consent of the countries of which the aliens are citizens or subjects, to any other countries.

when he left on a Yugoslav vessel, pursuant to an order of deportation, in 1942. The fact of the matter is that the Service was vigorously discouraging attempts by crewmen deserters to remain in the United States. They were returned to their homelands, or in the case of nationals of a government-in-exile, to the country where that government was located. But, so far as the United States was concerned, it was returning deserting seamen to the only "home country" they would have had if they had not deserted their ships. It was deporting them and thus unmistakably terminating whatever foothold they had tried to establish in this country.[10]

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[10] By the Act of August 8, 1958, 72 Stat. 546, Congress amended Section 249 of the 1952 Act in two particulars: First, the cut-off date by which entry into the United States had to be effected was advanced from July 1, 1924 (the date of the first permament quota statute) to June 28, 1940 (the date of the Alien Registration Act); second, the condition that the alien not be "subject to deportation," which had been a requirement since the first registry statute in 1929 (Act of March 2, 1929, 45 Stat. 1512), was dispensed with in favor of the less rigorous standard that he not be within those excludable classes of section 212(a) of the 1952 Act relating to criminals, narcotic violators, smugglers of aliens, subversives, procurers and other immoral persons. Compare 66 Stat. 219 with 72 Stat. 546. See Codifier's Note following Section 1259 of Title 8 U.S.C. The requirements of proving continuity of residence, good moral character, and eligibility for citizenship were left intact. Thus, the "elimination of the disqualification of deportables has made this procedure for adjustment of status available to many who previously were deportable as overstayed nonimmigrants or as illegal entrants." Gordon and Rosenfield, *Immigration Law and Procedure* (1962 ed.), § 7.6a, p. 736. See Auerbach, *Immigration Laws of the United States* (1955 ed.), p. 122. But,

Nor was petitioner's emigration to the United Kingdom, or to another land, made a "practical impossibility" because, as he asserts, he "had no travel documents which would have facilitated his landing in any other country" (Pet. Br. 4, 9). Form 535, "Description of Person Deported", which was completed eight days before petitioner departed on the *S.S. Dubravka*, clearly shows that petitioner "Ha[d] Jugo Slav passport # 173/1942" (G. Ex. 1, p. 1). And a passport, of course, is a "travel document." Sec. 101(a)(30) of the 1952 Act, 8 U.S.C. 1101(a)(30).

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while the approach was ameliorative and humanitarian, there is nothing in the legislative history of the 1958 amendment to suggest that Congress sought to relax the requirement of continuous residence. See S. Rep. 1905 and H. Rep. 1727, 85th Cong., 2nd Sess., pp. 1–2, respectively:

In 1962, the Senate approved but the House of Representatives rejected, a proposed amendment to Section 249 which would have advanced the required entry date to December 24, 1952. See S. Rep. 2276, 87th Cong., 2nd Sess., pp. 1–2; 108 Cong. Rec. 22,476 and 22,606. Congressman Walter, chairman of the House Judiciary Committee, stated that he was not in favor of advancing the required entry date of Section 249 (although he had previously introduced H.R. 11,911 which would have accomplished that result), since it would place a premium on the ability to hide. 108 Cong. Rec. 22,606, 22,607. The upshot of the disagreement was approval of a consolidation and streamlining of the suspension of deportation provisions under Section 244 of 1952 Act which, *inter alia*, denied suspension of deportation relief to alien crewmen. See the Act of October 24, 1962, 76 Stat. 1247. Senator Mansfield pointed out, during debate, that the amendment to Section 244 would grant "substantially the same relief" that would have been provided for in the earlier section 4 of the Senate Bill (*i.e.*, the proposed amendment to Section 249). 108 Cong. Rec. 23,448; see H. Rep. 2552, 87th Cong., 2nd Sess.; 108 Cong. Rec. 23,449.

3. There is, finally, no substance to the suggestion (Pet. Br. 20–21) that the provision of the deportation order granting petitioner advance permission to re-enter the United States temporarily as a seaman demonstrates that the Service expected and intended him to return to the United States to resume his residence. On its face, the waiver applied only to temporary entry "for such time as the alien may be admitted as a seaman," to "shore leave" accorded to a "bona fide seaman." The Ninth Proviso to Section 3 of the Immigration Act of 1917, 39 Stat. 874, 8 U.S.C. (1940 ed.) 136(q), to which the order referred, authorized the Service to promulgate rules and regulations "to control and regulate the admission of *otherwise inadmissible* aliens applying for *temporary admission.*" (Emphasis added.)[11] And the regulations in effect at the time simply provided that "the cases of all aliens of the excludable classes brought to seaports of the United States who apply for temporary admission * * * shall be submitted to the Department for special ruling." 8 C.F.R. 13.4 (1938 ed.). The advance "ruling" entered here was no more than it appears.

Then, as now, the law made prior arrest and deportation a basis for exclusion from the United States, and any entry or attempt to enter this country by such deported alien constituted a felony. 8 U.S.C.

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[11] The provision now appears in a somewhat more restricted form in Section 212(d)(3) of the 1952 Act, 8 U.S.C. 1182(d)(3), which included that portion of Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1008–1009, relating to the Ninth Proviso.

(1940 ed.) 180(a)." And then, as now, it was also provided that an "alien subject to exclusion from admission to the United States * * * who is employed upon a vessel arriving in the United States shall not be entitled to any of the landing privileges allowed by law to seamen." 45 Stat. 1551, 8 U.S.C. (1940 ed.) 180(c)." Thus, the purpose of the waiver was simply to permit petitioner, if otherwise qualified, to enjoy shore leave like any other foreign seaman, despite his prior deportation, should his vessel bring him to our ports.

There is nothing here that "colors" petitioner's deportation, nor any invitation to return. It must be remembered that the waiver was part of the deportation warrant, issued a month before petitioner shipped on the *S.S. Dubravka* and while it was presumably contemplated that he would be conveyed to Great Britain. The stipulation merely recognized the life of the sea which would likely bring petitioner to our ports sooner or later, and, with due regard for the ground of his deportation—involving no finding of criminality or undesirability—lifted one bar to shore leave should the occasion arise. Similar Ninth Proviso relief was not unusual in deportation orders respecting seamen. See, *e.g.*, *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292, 293, n. 4 (N.D. Cal.), affirmed, 287 F. 2d 561 (C.A. 9). In sum, the waiver carried with

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[11] Now contained in Sections 212(a)(17) and 276 of the 1952 Act, 8 U.S.C. 1182(a)(17) and 1326.

[12] See Section 252(a) of the 1952 Act, 8 U.S.C. 1282, for provisions which accomplish the same result.

it no special encouragement to petitioner to return at all, much less to establish a permanent residence here.

Nor can petitioner have been deceived by the narrow opening allowed. The language of the deportation order is plain enough that the only entry authorized was to a crewman on temporary shore leave. And that was not petitioner's status when he returned in late 1942. On December 19, 1942, he was ordered "detained on board at all U.S. ports" (G. Ex. 1, pp. 12, 31). On December 31, 1942, he was admitted into the United States for "medical treatment" (G. Ex. 1, pp. 24, 27, 31).[*] Moreover, petitioner testified at his 1952 hearing that when he entered the United States he intended to remain here and to reship on United States vessels. Thus, as the Special Inquiry Officer and the district court both found, petitioner's re-entry was not that of a *bona fide* seaman, *i.e.*, one who intended to re-ship in the same vessel that brought him to the port of arrival or another vessel within the temporary landing permit period (R. 8; G. Ex. 1, 31–33). In the circumstances, it ill behooves petitioner to tax the Immigration Service for treating him more generously than the law required.

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[*] The laws then in effect, as now, authorized a crewman's *temporary* admission for hospital or medical treatment. See Section 32 of the Act of February 5, 1917, 39 Stat. 874, 895, 8 U.S.C. (1940 ed.) 169, 170; Section 253 of the 1952 Act, 8 U.S.C. 1283. See H. Rep. 1365, 82nd Cong., 2d Sess., pp. 51–52, 66; S. Rep. 1515, 81st Cong., 2nd Sess., pp. 384–385.

B. DEPORTATION IS INCOMPATIBLE WITH CONTINUED RESIDENCE IN THE UNITED STATES

Deportation and continued residence in the United States are inherently incompatible. One whom Congress has found undesirable as a resident of the United States and who has actually been expelled from the United States cannot be allowed to claim residence in the United States. This Court, many years ago, in describing the essential character and effect of a deportation order, stated that deportation was not punishment for crime or banishment, but was simply "a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that *his continuing to reside here shall depend.*" (Emphasis added.) *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730. An act which constitutes deportation must necessarily be an act which breaks continuous residence in the United States.

Congress had made it a felony for one to enter or attempt to enter within one year after deportation (unless a reapplication for admission had been consented to in advance.)[19] It would be inconceivable to hold that one could maintain a residence in the United States after deportation, but that any attempt to

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[19] Sections 212(a)(17) and 276 of the 1952 Act, 8 U.S.C. 1182(a)(17) and 1326. See Sec. 1(a)–(d) of the Act of March 4, 1929, 45 Stat. 1551, as amended by the Act of June 24, 1929, 46 Stat. 41, and the Act of May 25, 1932, 47 Stat. 165, 8 U.S.C. (1940 ed.) 180, 181.

come to that residence is a crime. This provision applied to petitioner for, as we have seen, the waiver of excludability under the 9th Proviso to Section 3 of the 1917 Immigration Act in petitioner's deportation order applied only to temporary admission as a crewman. Any entry by the petitioner other than as a crewman would have subjected him to criminal prosecution. His deportation thus necessarily constituted a break in his residence.

All the authorities are in agreement with the courts below that deportation operates as a severance of continuous residence for purposes of Section 249. *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292, 295-296 (N.D. Cal.), affirmed, 287 F. 2d 561 (C.A. 9); *Lum Chong* v. *Esperdy*, 191 F. Supp. 935, 937 (S.D.N.Y.); *Boulamandis* v. *Brownell*, 247 F. 2d 83, 84 (C.A.D.C.); *Matter of P—*, 8 I & N Dec. 167, 169 (1958); *Matter of S—J—S—*, 8 I & N Dec. 463, 465 (1959). Gordon and Rosenfield, *Immigration Law and Procedure* (1962 ed.), § 7.6(b) 1962 Supp. p. 179. See also, *Matter of R—*, 8 I & N Dec. 598, 599 (1960).

Thus, in *Lum Chong* v. *Esperdy, supra*, the alien entered the United States in 1929; was ordered deported in January 1946; voluntarily departed from the United States as a crewman, signed up for a foreign voyage on board a vessel of United States registry, and, following a six week absence during which his ship docked at a foreign port (but the alien did not disembark on foreign soil), returned to the United States and was readmitted as a crewman for shore leave. The alien's departure was not verified by immi-

gration authorities, and the order of deportation was not marked as executed. The alien testified that, at the time he departed, he was unaware that a final deportation order had been entered against him. In upholding the denial of Section 249 relief, Judge Dimock stated, in part (*id.* at 937):

> To hold that an alien who had been excluded by law from this country still had here an actual dwelling place in fact while he was out of the country would be nothing but judicial revolt against the legislat[ure].

Similarly, in *Sit Jay Sing* v. *Nice*, *supra*, 182 F. Supp. 292, affirmed, 287 F. 2d 561 (C.A. 9), another Section 249 case, the alien entered the United States as a nonimmigrant crewman in 1939; overstayed his shore leave and was ordered deported in 1943; voluntarily departed from the United States as a crewman on board a vessel of United States registry; and returned to the United States seven weeks later. The deportation order was marked as executed when he departed in 1945. In holding that the provisions of Section 249 compelled rejection of the alien's contention that voluntary departure on board a vessel of United States registry did not interrupt his residence in the United States, Judge Youngdahl stated, in part (182 F. Supp. at 296):

> *If the plaintiff had been deported in 1945 at Government expense, he could not satisfy § 249. Simply because the Government permitted him to leave at his own expense does not mean a different result should obtain* * * * [T]he Government's consent to the method of depor-

tation does not lessen the force of the deportation; it does not make plaintiff's deportation something less than a Government-paid-for deportation. [Emphasis added.]

The Court of Appeals for the Ninth Circuit affirmed this decision *per curiam* "[f]or the reasons stated in the opinion of the district court." 287 F. 2d 561.

Boulamandis v. *Brownell*, 247 F. 2d 83 (C.A.D.C.), presented the question whether the voluntary departure in 1947, after entry of an order of deportation, of an alien who had maintained more than seven years continuous residence in the United States interrupted his residence in the United States for purposes of qualification for suspension of deportation under section 19(c)(2)(b) of the Immigration Act of 1917, as amended July 1, 1948, 62 Stat. 1206. In a *per curiam* decision, the court held that a break in residence had occurred since the appellant "had left the country * * * in the exercise of a privilege of voluntary departure after an earlier order of deportation." *Id.* at 84.

The administrative rulings, also, are consistent. While the Immigration and Naturalization Service recognizes that continuity of residence for purposes of Section 249 is not always synonymous with physical presence, and that temporary absences from the United States are permitted in determining eligibility under Section 249, it has consistently maintained that "departure from the United States as a result of exclusion or expulsion proceedings breaks the continuity of residence for the purpose of section 249." *Matter*

of P—, 8 I & N Dec. 167, 169 (1958); *Matter of S—J—S—*, 8 I & N Dec. 463, 465 (1959). In *Matter of R—*, 8 I & N Dec. 598, 599 (1960), the Assistant Commissioner, in upholding a grant of Section 249 relief by the district director, was careful to point out that the applicant's 1954 departure "was not the result of exclusion or expulsion proceedings and his absence was temporary." See, also, Gordon and Rosenfield, *Immigration Law and Procedure* (1962 ed.), § 7.6(b), p. 737, and 1962 Supp. p. 179.

In short, the crucial fact here is that petitioner was deported. That alone sufficiently distinguishes *Rosenberg* v. *Fleuti*, 374 U.S. 449. Decision there rested on the special history of a wholly distinct provision—and, unlike this case, involved a visit of a few hours to a neighboring country, not the applicant's. But, those differences to one side, the character of the "break" in residence is fundamentally dissimilar in the two situations. There, the traveller, with an established residence in this country, which he was free to retain indefinitely, left casually with the obvious intention of retaining his American abode and returning to it. Here, a seaman, illegally in the country and ordered expelled, departs under threat of compulsory deportation, with no hope of resuming his United States residence. Plainly, even if their absences were comparable and were to be judged under the same statute, the conclusion must be that Mrvica, unlike Fleuti, lost his American residence.

C. PETITIONER DID NOT HAVE AN ACTUAL DWELLING PLACE IN FACT WITHIN THE UNITED STATES WHILE HE WAS ON A YUGOSLAV SHIP

Petitioner places his principal reliance on the fact that residence is defined in Section 101(a)(33) of the 1952 Act as "the place of general abode," which in turn is defined as the "actual dwelling place in fact, without regard to intent". The argument is that the United States remained petitioner's "actual dwelling place in fact", despite his deportation, regardless of the intent of the United States to deport him and also without regard to petitioner's intent to return to the United States."

The definition cuts quite the other way. One cannot dwell "in fact" at a place from which one has been physically and lawfully excluded and to which one has absolutely no right to return. Deportation and continuous residence in the United States are mutually incompatible. Whether or not a deported alien takes up residence in another country, his compelled departure surely renders him a nonresident of the United States. If now, in peacetime, a Yugoslav national were deported to Yugoslavia and a week later he managed to slip into the United States, no one, we suppose, would argue that his deportation had not broken his continued residence in the United States. Yet, there was nothing in the wartime condi-

[10] Petitioner's intent to return to the United States after deportation is obviously of no significance under the statute. As noted above, return after deportation is a crime unless prior permission to apply is granted.

tions of 1942 that significantly altered that rule for petitioner's case: As we have shown, the United States intended and actually accomplished petitioner's deportation when petitioner, who had a Yugoslav passport, departed on a Yugoslav vessel under the jurisdiction of the Yugoslav government-in-exile.

If petitioner had a permanent residence after his deportation it was his home in Yugoslavia, where he had (and apparently still has) a wife and three children (G. Ex. 1, 19, 23, 60),[16a] the same permanent residence he had before his first desertion in 1940 and before his departure in 1942. His actual dwelling place in fact was his ship. Indeed, here, because the vessel he boarded flew the Yugoslav flag and was subject to the jurisdiction of that government (*Crapo* v. *Kelly*, 16 Wall. 610; *Wilson* v. *McNamee*, 102 U.S. 572, 574; *United States* v. *Rodgers*, 150 U.S. 249, 264–265; see *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 600–602), it may be said that petitioner at once resumed his former Yugoslav residence.[17] *Delany* v. *Moraitis*, 136 F. 2d 129 (C.A. 4).

There is no novelty in the suggestion that a seaman can have his residence aboard a ship, and that the flag of the vessel may be significant for purposes of residence. Congress gave recognition to this principle many years ago when it enacted legislation permitting the naturalization of seamen who served on certain American vessels without regard to the general resi-

[16a] At his 1952 deportation hearing, petitioner testified that, during his stay in the United States, he sent the equivalent of $200 per month to his family in Yugoslavia (G. Ex. 1, p. 19).

[17] Though the fact is fortuitous, it is worth noting that prior to his initial entry into the United States, petitioner's actual dwelling place was another Yugoslav vessel.

dence requirements. The Act of May 9, 1918, 40 Stat. 542, amended the Naturalization Act of 1906, 34 Stat. 596, by making eligible for naturalization "without proof of the required five years' residence" aliens who had served for three years on board any vessel of the United States Government or "for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden."[18] But, at the same time, the Act made clear that "service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens cannot secure residence for naturalization purposes during service upon vessels of foreign registry."[19] In *McDonald* v. *United States*, 279 U.S. 12, 22–23, this Court rejected a claim of continuous residence during a period of service as a master of an American-owned but foreign-registered vessel, notwithstanding the

[18] See the Act of June 7, 1872, 17 Stat. 262, 268, R.S. 2174, which allowed admission to citizenship of alien seamen who had "served three years on board of a merchant vessel of the United States subsequent to the date of [his] declaration [of intention to become a United States citizen]."

[19] This provision was "in reality simply declaratory of the law as it existed before the time of the passage of the amendment." *United States* v. *Habbick*, 287 Fed. 593, 595 (E.D.N.Y.). See *Petition of MacKinnon*, 183 N.Y.S. 108 (App. Div., 2d Dept.); *In re Willis*, 169 N.Y.S. 261, 262 (Sup. Ct. N.Y. County). In the *Willis* case, the naturalization court, in rejecting the applicant's claim of continuous residence for naturalization purposes where he had been employed as a crewman on a ship of foreign registry during the critical period, declared that "residence aboard a foreign vessel cannot be construed as a residence in the United States. It can only be considered as being upon foreign territory." *Ibid.*

fact that the alien had a wife and family residing in the United States at the time.

Later, Congress specifically provided that service aboard certain American vessels should be deemed "residence" for purposes of the naturalization provisions. Section 307(d) of the Nationality Act of 1940, 54 Stat. 1137, 1143, so characterized "[c]ontinuous service by a seaman on a vessel or vessels whose home port is in the United States and which are of American registry or American owned, if rendered subsequent to the applicant's lawful entry into the United States for permanent residence and immediately preceding the date of naturalization." And Section 325 (a) of the same Act, 54 Stat. 1150, made it possible for certain seamen who served honorably for five years on board vessels belonging to the United States Government or certain vessels "which [were] not foreign vessels, and whose home port [was] in the United States" to be naturalized "without having resided continuously * * * in the United States for * * * five years," the rationale being that such ships were "regarded as United States soil." 86 Cong. Rec. 11,964; S. Rep. 2150, 76th Cong., 3rd Sess., p. 3. Finally, Section 330 of the 1952 Act, 8 U.S.C. 1441, which is a substantial re-enactment of Section 26 of the Internal Security Act of 1950, 64 Stat. 987, 1015,* provides, in part:

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* The purpose of this provision was to "limit" the application of Section 325 to those aliens admitted for permanent residence and to require that the service be on vessels "fully owned" by the United States or an American citizen or corporation. H. Rep. 3112, 81st Cong., 2nd Sess. p. 61.

> Any periods of time during all of which a person who was previously lawfully admitted for permanent residence has served honorably or with good conduct, in any capacity other than as a member of the Armed Forces of the United States, (A) on board a vessel operated by the United States, or an agency thereof, the full legal and equitable title to which is in the United States; or (B) on board a vessel whose home port is in the United States, and (i) which is registered under the laws of the United States, or (ii) the full legal and equitable title to which is in a citizen of the United States, or a corporation organized under the laws of any of the several States of the United States, shall be deemed residence and physical presence within the United States within the meaning of section 1427(a) of this title, if such service occurred within five years immediately preceding the date such person shall file a petition for naturalization.

In light of these provisions it seems plain petitioner's residence aboard the Yugoslav ship broke the continuity of his residence in the United States. Indeed, it would be most incongruous to attribute to Congress, which has distinguished between service by a crewman on an American vessel and service on a foreign vessel in crediting residence for purposes of naturalization (Section 330 of the 1952 Act and its statutory antecedents),[11] a purpose to blur the distinction, or to ignore ship service altogether, when it

[11] See *McDonald* v. *United States*, *supra*; *Duron* v. *United States*, 246 F. 2d 400, 402 (C.A. 2); *United States* v. *Camean*, 174 F. 2d 151, 153 (C.A. 2); *Petition of Witt*, 118 F. Supp. 855, 856-857 (E.D. N.Y.); *Petition of Napalon*, 145 F. Supp.

comes to residence for purposes of registry under Section 249. Registry, after all, is often a first step toward naturalization: it legalizes the alien's status to that of one lawfully admitted for permanent residence [22]—the basic condition precedent to naturalization. Sections 316 and 318 of the 1952 Act, 8 U.S.C. 1427 and 1429.

CONCLUSION

For the reasons set forth, we respectfully submit that the judgment below should be affirmed.

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295, 298 (S.D. N.Y.); *In re Van Der Schuur*, 20 F. Supp. 42, 43 (N.D. Cal.); *Petition of Bone*, 19 F. Supp. 219, 222 (E.D. Mich.); *Application of Aguirre*, 90 F. Supp. 668, 670 (S.D. N.Y.); see also, *Kwong Hai Chew* v. *Colding*, *supra*; *Petition of Karadzas*, 124 F. Supp. 25, 26 (S.D. N.Y.).

[22] See, S. Rep. 1504, 70th Cong., 2nd Sess., p. 4; H. Rep. 2763, 70th Cong., 2nd Sess., pp. 2-3; H. Rep. 318, 76th Cong., 1st Sess., p. 2; S. Rep. 916, 76th Cong., 1st Sess., pp. 1-2; 70 Cong. Rec. 2289, 2980, 4696, 4779, 4947, 5172. See *Sit Jay Sing* v. *Nice*, 182 F. Supp. 292, 296 (N.D. Cal.), affirmed, 287 F. 2d 561 (C.A. 9); *Linklater* v. *Perkins*, 74 F. 2d 473, 476 (C.A. D.C.); *United States* v. *Goldstein*, 30 F. Supp. 771, 773 (E.D. N.Y.); Gordon and Rosenfield, *supra;* Auerbach, *Immigration Laws of the United States* (1955 ed.), p. 9; Kansas, *United States Immigration, Deportation and Citizenship* (3rd ed., 1948), p. 312.

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